87-2103

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH E. GALLAGHER, Esquire
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QUESTION PRESENTED

Whether the trier of fact may consider the ability of the Plaintiff to perceive that the government injured him, when that ability was destroyed by the government, as one of the circumstances in determining the diligence of the Plaintiff in discovering his injury under the Federal Tort Claims Act.

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TO THE HONORABLE, THE CHIEF JUDGE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 5, 1988.

OPINIONS BELOW

The Opinion of Honorable Sylvia H. Rambo, United States District Court, Middle District of Pennsylvania dated July 23, 1986, unreported, is reprinted in the appendix hereto, page 1(a), *infra.*

The Opinion of Honorable Sylvia H. Rambo, United States District Court, Middle District of Pennsylvania dated March 13, 1987, unreported, is reprinted in the appendix hereto, page 1(b), *infra.*

The Opinion of United States Court of Appeals for the Third Circuit entered on February 23, 1988, unreported, is reprinted in the appendix hereto, page 1(c), *infra.*

JURISDICTION

The United States Court of Appeals for the Third Circuit issued Majority, Concurring, and Dissenting opinions, (Appendix 2c, 12c, 16c) on February 23, 1988. On March 28, 1988, the United States Court of Appeals for the Third Circuit issued an Order denying a petition for rehearing. On April 5, 1988, pursuant to the denial of rehearing, the Court of Appeals For the Third Circuit entered judgment in lieu of a formal mandate (Appendix 1e). The Jurisdiction of the District Court was pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2401(b) (1982) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF THE FACTS

This is a medical malpractice action brought against the United States of America pursuant to the Federal Torts Claims Act alleging the physicians at the Veterans Administration

Hospital in Wilkes-Barre, Pennsylvania, failed to diagnose and treat Plaintiff's service-connected psychiatric condition, which failure resulted in the development of a more serious permanent anxiety disorder.

Plaintiff is a veteran of the United States Army, having enlisted in June of 1970. He served on active duty in Korea for 13 months and was subject to hazardous duty in the demilitarized zone. Six months into his tour in Korea, Plaintiff's personality begin to change. He became anxious and frightened. In January, 1972, he was specially discharged in order to return to the United States. Upon his discharge in Korea he was prescribed tranquilizers and advised to contact his local Veterans Administration Hospital for treatment.

Within a week of his arrival home, he reported to the Veterans Administration Hospital in Wilkes-Barre for an examination and assistance. He was in great distress at the time. He withdrew from his family and friends and remained in his room and cried for long periods of time. On January 17, 1972, he was diagnosed at the Veterans Administration Hospital as having severe heart palpitations and anxiety. He was prescribed medication for his condition.

The Plaintiff was assigned to the care of Dr. George Anghel at the Veterans Administration Hospital in Wilkes-Barre.[1] During this time, Dr. Anghel, for the first time in his practice of medicine, was not supervised by other physicians. Dr. Anghel was not Board Certified in psychiatry, although he was treating the Plantiff for a psychiatric disorder. Because of Plaintiff's deteriorating condition, Plaintiff's family pleaded that the Plaintiff be hospitalized for treatment, but they were informed by Dr. Anghel that the Plaintiff did not need to be hospitalized because he was going through a period of adolescent adjustment. Dr. Anghel stated that Plaintiff, John Barren, had a low I.Q. which would prevent him from getting hospitalized therapy, although there is no record that Dr. Anghel ever tested Barren's I.Q. Dr. Anghel further testified that John Barren made bizarre statements, and because of that, he was not "sophisticated enough for hospitalization".

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[1] The same hospital that gave rise to the claims in *United States vs. Kubrick.*

Dr. Anghel for a two year period continued to medicate John Barren without a treatment plan or coordination of his medication. During this period, the undisputed evidence established the Plaintiff did not know his condition; was unable to appreciate his condition; and, did not even remotely realize the cause or aggravation of his injury.

On October 30, 1977 the Veterans Administration determined for the first time that the Planitiff had anxiety neurosis, and that it was service connected. As a result, the Veterans Administration awarded him a 30% disability rating retroactive to February 1973.

On September 7, 1979 the Plaintiff filed an administrative tort claim alleging that the Defendant's failure to diagnose and treat Plaintiff's service connected mental disorder upon discharge resulted in a permanent and chronic psychiatric disorder.

In June, 1981, the Plaintiff was adjudicated an incompetent and his sister, Henrietta Barren, was appointed his guardian. The Plaintiff has been and remains to this day confused and unrealistic about his mental condition.

In September, 1981, following a denial of Plaintiff's administrative claim, a Complaint under the Federal Tort Claims Act was filed in the Middle District of Pennsylvania.

In October, 1985, in a bifurcated trial, the Honorable Sylvia Rambo of the United States District Court for the Middle District of Pennsylvania found that the Government was liable for medical malpractice in the treatment of the Plaintiff.

On November 19, 1986, after a trial as to the issue of damages, the Honorable Sylvia Rambo directed that judgment be entered in favor of John Barren and against the Government in the amount of $1,124,000.00.

The Government appealed the District Court judgment and the judgment was reversed by a split decision of the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The Federal Tort Claim Act provides that an action is barred unless commenced by filing administrative requests within two years after the "claim accrues" (28 U.S.C. § 2401(b)). The statute does not specify when a "claim accrues". This Court, in *United States vs. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), held that a medical malpractice claim does not accrue under the Act until the plaintiff discovers, or in the exercise of reasonable diligence should discover, both the injury and its cause.

The Court below has changed, altered, and limited the clear meaning of the *Kubrick* decision. This Court in *Kubrick* held that a plaintiff must be "in possession of the critical facts that he has been injured and who has inflicted the injury", *Id.* 444 U.S. at 122, before a claim accrues. Under the Court of Appeals decision, the trier of fact is prohibited from considering the nature of and the effect of the injury on the plaintiff in a determination of when a claim has accrued.

The unfairness, inequity, and limitation of this change is manifested by the facts of this case. The inequity allows the government to profit from its own negligence. The limitation imposed by the Court of Appeals excludes from consideration by the trier of fact the inability of the Plaintiff to comprehend his injury and its cause. The Court of Appeal's decision treats victims of admitted government malpractice unfairly and unjustly alters the clear holding of the *Kubrick* decision.

Moreover, the definition of "accrual" as it relates to the discovery rule potentially affects every case brought under the Federal Torts Claims Act. The recurring nature of this question makes review by this Court especially appropriate.[2]

Another consideration which makes review by this Court appropriate is that the decision of the Eighth Circuit Court of

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[2] The government in its Petition For Certiorari in the *Kubrick* case cites internal Veterans Administration and Department of Justice records for the potential affect of the *Kubrick* decision. Petition For A Writ of Certiorari, *United States v. Kubrick*, at 14. Those statistics are as valid today as they were when they were cited by the government in the *Kubrick* case and are applicable to the decision on this case.

Appeals in *Clifford By Clifford vs. United States,* 738 F.2d 977 (8th Cir. 1984), and of the Ninth Circuit Court of Appeals in *Washington vs. United States,* 769 F.2d 1436 (9th Cir. 1985), *Augustine vs. United States,* 704 F.2d 1074 (9th Cir. 1983), and *Simmons vs. United States,* 805 F.2d 1363 (9th Cir. 1986), and of the Tenth Circuit Court of Appeals in *Zeidler vs. United States,* 601 F.2d 527 (10th Cir. 1979), conflicts with the decision of the Third Circuit in this case.

In *Clifford by Clifford vs. United States, supra,* the plaintiff had fallen under a permanent coma due to the negligence of government physicians. The government contended that the cause of action accrued on the date the patient went into the coma, but the Court rejected that contention holding that the cause accrued when the guardian was appointed, as that was the first date when someone had the requisite knowledge of the patient's injury.

The *Clifford* Court considered the plaintiff's ability to appreciate his condition in determining whether his action accrued for Statute of Limitations purposes. The Eighth Circuit Court of Appeals stressed that its decision was consistent with *Kubrick* and stated that *Kubrick* "has to do with what knowledge a claimant must have before the statute begins to run. Here we deal with a rare situation where the alleged malpractice itself . . . prevented the claimant from ever obtaining that knowledge." *Id.* at 980.

The Ninth Circuit Court of Appeals in *Washington vs. United States, supra,* held that the Plaintiff's cause of action under the Federal Tort Claims Act accrued when the comatose plaintiff died, not when she entered her fourteen year coma. The Court reasoned that the plaintiff satisfied the rule because she was never aware of the injury or its cause. Both Circuits stressed that their findings were consistent with the Supreme Court in *Kubrick.*

The only distinction that can be made between the coma cases and the case *sub judice,* is that in the coma cases the plaintiffs could not function at all as dramatically demonstrated by their condition. In the present case, the undisputed expert testimony, while not as dramatic, places the plaintiff in the same functional position as the coma victim. The question then

becomes one of fact, not of law, in determining the plaintiff's ability to obtain the knowledge as to his condition. The District Court determined this fact in favor of the plaintiff. The Third Circuit decision would now prohibit such a determination by the trier of fact.

In *Simmons vs. United States, supra,* the Court of Appeals for the Ninth Circuit held that the Statute of Limitations had not run on a patient who sued her government sponsored counselor for malpractice for wrongly engaging her in sexual relations during the course of her treatment. The rationale for the decision flows from the inability of the victim, because of her relationship with her doctor, to understand the nature of the cause of her injury. The Court recognized the fact that "accrual" requires the need to crystalize both knowledge of an injury and its cause. The Court held that the consideration of the plaintiff's ability to possess this knowledge is essential to the determination of when the action accrues. The rationale of the Third Circuit Court of Appeals would prohibit consideration of this ability and undermine the vitality of the *Kubrick* decision.

The Third Circuit Court of Appeals decision, alters, changes, and limits the Supreme Court ruling in *Kubrick.* It is in conflict with the decisions of the Eighth, Ninth and Tenth Circuits. It unfairly and unjustly limits the rights of victims of government malpractice. It allows the government to profit from its own tortuous acts and punishes individuals for their blameless ignorance. This ruling has a potential affect on thousands of other claims, and as such, it is an appropriate case for review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1064

JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN, and HENRIETTA BARREN, in her own right,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM

Plaintiff, John Barren, brought this case pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674, asserting that he was damaged by the medical malpractice of health care employees at the Veterans Administration Hospital in Wilkes-Barre, Pennsylvania. It is alleged that those employees failed to properly admit and otherwise treat Barren, a veteran, for a service-connected psychiatric condition. As a result of this failure, Barren contends that his condition has become chronic and that he has little or no hope of recovery.

Background

Barren enlisted in the United States Army on June 22, 1970. He eventually received orders for overseas duty and arrived in Korea in November of 1970. He spent approximately the next thirteen months on hazardous duty at Camp Casey. While in Korea, Barren began experiencing increasing amounts of nervousness and anxiety and on January 1, 1972, he

received special orders to return to the United States. He left Korea on January 2, 1972 for Fort Lewis, Washington. Barren was provided with an unspecified amount of Librium by military personnel, apparently to help relieve his nervousness and anxiety on the trip home. Upon arriving at Fort Lewis, Barren visited the dispensary and was advised to contact the V.A. Hospital upon his return home for a physical examination.

On January 5, 1972, Barren arrived at his parents' home in Peckville, Pennsylvania and on January 12, 1972, he reported to the V.A. Hosptial in Wilkes-Barre for a physical examination. His principal complaints at that time were heart palpitations and a skin condition. Because of his recent serverance from active duty, Barren was determined to be prima facie eligible for treatment pending a determination of service connection and was so advised by the Veteran's Administration. On January 17, 1972, he again visited the V.A. Hospital for an electrocardiogram. The diagnostic impression at this time was severe heart palpitations and anxiety.

The records of the V.A. Hospital show that John Barren sought outpatient psychiatric consultations on or about August 15, 1972; December 22, 1972; February 26, 1973; March 26, 1973; and April 1, 1974. In the out-patient clinic Barren was treated by Dr. Anghel who prescribed Librium and Valium. *During 1972, Barren was refused in-patient treatment at the V.A. Hospital because, according to the V.A., service connection was not established.*

On January 24, 1973, the Veteran's Administration granted service connection for Barren's skin condition but not for his heart palpitations or anxiety. Thereafter, on February 26, 1973, Barren visted the V.A. Hospital and reopened his claim to add the nervous condition. He continued to see Dr. Anghel and began to see Dr. Potelunas, a dermatologist. At this time Dr. Anghel prescribed Mellaril and Dr. Potelunas prescribed Valium, apparently because he believed Barren's skin problem to be the result of a nervous condition.

On May 9, 1973, Barren underwent a psychiatric examination by Dr. Anghel as a part of the disability evaluation

process.[1] Dr. Anghel termed his personality as "healthy"; his diagnosis was "adjustment reaction of adolescence." On July 6, 1973, Barren was advised that his disability claim was denied and on *August 2, 1973, he was notified that his nervous condition was not deemed to be service connected.*

Notwithstanding this decision, Barren returned to the out-patient clinic and Dr. Anghel for help and was told to "stop running in and out of the out-patient clinic for drugs." In *December of 1973, Barren's mother and his sister, plaintiff Henrietta Barren, visited Dr. Anghel.* They told him that John was becoming uncontrollable and asked for assistance. He then sent them to Mr. Watson, Chief of Admissions at the V.A. Hospital in Wilkes-Barre. Watson advised them that admission was unavailable without service connection. Watson further advised that the first step in establishing service connection would be to have Barren admitted to the V.A. Hospital for evaluation; however, Watson determined, after conferring with Dr. Anghel, that this was not warranted.

On January 11, 1974, Barren was notified by postcard that his application for hospitalization was denied because he was not in need of such care. His family then admitted him to the Scranton State Hospital for a brief period where he was placed in the alcohol rehabilitation unit and treated with Benadrill and Thorazine. Dissatisfied with the quality of this treatment, Barren was discharged to home on February 1, 1974.

On February 18, 1974, Barren came under the care of J. Paul Hurst, M.D., his current treating psychiatrist. Dr. Hurst hospitalized Barren at Abington Memorial Hospital where he remained until March 3, 1974. At the time of discharge, Barren was diagnosed as suffering from an immature personality disorder, depression neurosis and chronic lumbosacral sprain. Hurst prescribed Elavil, 200 mg. daily, and Valium, 5 mg. q.i.d. Barren was to be treated by Dr. Hurst on an out-patient basis due to the family's financial status and the distance between

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[1] It is apparently a departure from established V.A. procedure to have the disability evaluation performed by the veteran's treating physician, but in this case another doctor was not available.

Hurst's office and plaintiff's home (approximately 270 miles round trip).

On June 26, 1974, Barren was again hospitalized by Dr. Hurst, this time at the Eastern Pennsylvania Psychiatric Institute (EPPI). Barren underwent extensive testing and was discharged from EPPI on July 26, 1974, with a diagnosis of anxiety neurosis. He was treated with Navane, 5 mg. and Cogenten, 2 mg. and was to continue to be treated by Dr. Hurst on an out-patient basis. Plaintiff has continued to see Dr. Hurst up through the present time.

Plaintiffs filed their administrative tort claims on September 7, 1979. John Barren was adjudicated an incompetent in state court in June 1981. From 1973 forward, Barren and his family sought benefits from the Veterans Administration related to his condition, including both disability benefits as well as reimbursement for medical, travel and other out-of-pocket expenses. After several hearings, Barren was awarded service connection and a 30% disability rating on October 30, 1977, retroactive to February 26, 1973. That rating was increased to 50% on March 15, 1979, retroactive to August 23, 1977 (the date of his evaluation at the V.A. facility in Lebanon, Pennsylvania). The rating was increased to 100% on October 18, 1984.

Discussion

The Statute of Limitations

This claim for medical malpractice is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674 (FTCA). Jurisdiction is conferred upon the district court by 28 U.S.C. § 1346(b). Under 28 U.S.C. § 2401(b),

> A tort claim against the United States shall be forever barred unless presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months . . . of notice of final denial of the claim by the agency to which it was presented.

Defendant contends that the actions presented here are thus barred by the statute of limitations. Plaintiffs counter that

Barren's claim was filed within the applicable time period as interpreted by the courts of the United States.

The appropriate standard to be applied in computing the statute of limitations in medical injury cases was articulated by the Supreme Court in *Urie v. Thompson,* 337 U.S. 163 (1949). The court held that for purposes of the statute of limitations, the tort action does not accrue until the plaintiff is put on notice of the wrong. This doctrine was extended to medical malpractice cases under the FTCA in *Quinton v. U.S.,* 304 F.2d 234 (5th Cir. 1962). Thus, in medical malpractice cases brought under the FTCA, the statute of limitations does not begin to run until after the patient discovers or, in the exercise of reasonable diligence, should discover, his injury and its cause. *United States v. Kubrick,* 444 U.S. 111 (1979); *Stoleson v. U.S.,* 629 F.2d 1265, 1268 (7th Cir. 1980). The reasoning in support of this rule was clearly stated by the court in *Stoleson:*

> [A] patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. Sometimes a patient may remain unaware for many years that he has suffered injury or he may recognize his injury but not its cause. Indeed, the facts necessary to discover the causal relation between treatment and injury may be within the exclusive control of the physician or at least very difficult to obtain.

629 F.2d at 1268.

Plaintiffs here argue that at no time between the period 1972-1974 and October of 1977 (23 months prior to the uncontested filing date of September 7, 1979) did John Barren know that he suffered an injury as a result of the negligence of the defendant. It is argued that John Barren was at all times during this period unable to comprehend that his mental condition had deteriorated while he was under the care of the V.A. medical personnel and that the deterioration was caused by the treatment received at the hands of the V.A. To the contrary, to the extent that John Barren was capable of assessing his mental problems, he believed them to be the result of his tour of duty in Korea. It is argued that Barren never

suspected that he was suffering from anything that was not service-connected and for which he was seeking V.A. benefits. Only when the V.A. notified him of its disability rating of 30% did Barren suspect that he had sustained an injury that was not service-connected. Prior to this notification, received October 20, 1977, Barren had no idea that his condition or any portion thereof was caused by anything other than his tour of duty in Korea.

As previously stated, a claim under the FTCA accrues when a plaintiff knows both the existence and cause of his injury. *United States v. Kubrick,* 444 U.S. at 122-123. However,

> The question of what knowledge should put a claimant on notice of the existence of a viable claim is not soluble by any precise formula . . . It is not enough to trigger the statute of limitations that the claimant is aware of his injury if he is unaware of the act or omission which caused the injury (citations omitted).

Waits v. United States, 611 F.2d 550, 552 (5th Cir. 1980). Stated another way,

> [c]ourts must guard against a premature application of a statute of limitations until such time as a plaintiff has a reasonable belief that he has a cause of action against the prospective defendant. An where that reasonable belief is delayed thorugh the plaintiff's "blameless ignorance" of the fact of his injury or of the fact of its probable cause, the plaintiff will not be held prejudiced thereby (citations omitted).

Schnurman v. United States, 490 F.Supp. 429, 431 (E.D.Va. 1980) In *Kubrick,* this doctrine of "blameless ignorance" was left intact. *See Waits v. United States,* 611 F.2d at 552.

Plaintiffs argue that this is an "aggravation" type of case, that is, one in which plaintiff claims that as a result of the alleged malpractice, an existing injury develops into a more serious one. Augustine v. United States, 704 F.2d 1074 (9th Cir. 1983) is instructive. In that case, plaintiff had a "bump" on his palate for which he sought treatment from Air Force dental surgeons.

Proper care was not provided and the "bump" developed into metastatic cancer. In differentiating the "aggravation" type of case, the court reasoned:

> When a physician's failure to diagnose, treat, or warn a patient results in the development of a more serious medical problem than that which previously existed, identification of both the injury and its cause may be more difficult for a patient than if affirmative conduct by a doctor inflicts a new injury. Where a claim of medical malpractice is based on the failure to diagnose or treat a pre-existing condition, the injury is not the mere undetected existence of the medical problem at the time the physician failed to diagnose or treat the patient or the mere continuance of that same undiagnosed problem in substantially the same state. Rather, the injury is the *development* of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment. In this type of case, it is only when the patient becomes aware or through the exercise of reasonable diligence should have become aware of the development of a preexisting problem into a more serious condition that his cause of action can be said to have accrued for purposes of section 2401(b).

Augustine, 704 F.2d at 1078.

Plaintiffs argue that prior to October 1977, John Barren was so ill or confused that he was not capable of understanding that he had been injured by the negligence of the defendant. The general rule is that disability due to mental incompetence does not toll the running of the statute of limitations under the FTCA. *Casias v. United States,* 532 F.2d 1339, 1342 (10th Cir. 1976), *citing Accardi v. United States,* 435 F.2d 1239 (3d Cir. 1970). An exception to this rather harsh rule may be made "when the mental condition bears on the plaintiff's ability to understand the nature and cause of his injuries." *Kelly v. United States,* 554 F.Supp. 1001, 1005 (E.D.N.Y. 1983); *See also, Zeidler v. United States,* 601 F.2d 527 (10th Cir. 1979). Further, an exception may be made where the claimant is unable to understand the nature and cause of his injuries as a

result of the malpractice alleged. *Dundon v. United States*, 559 F.Supp. 469, 474-475 (E.D.N.Y. 1983). However, in each of the cited cases, the courts differentiated between brain damage or destruction and ordinary mental disability or insanity. All of the cases allowing an exception to the general rule, as found by this court, involve the first category. *See Zeidler* (lobotomy); *Dundon* (comotose plaintiff); *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985) (comotose plaintiff). Thus, this court cannot find that the statute of limitations was tolled because of plaintiff's mental disability.

However, plaintiff's mental condition at the time of the allegedly negligent conduct, and which resulted from that conduct, may be considered part of the external circumstances under which the reasonableness of a plaintiff's diligence in discovering the wrong must be assessed. *Greenberg v. McCabe*, 453 F.Supp. 765 (E.D.Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir. 1979). *Greenberg* is not an FTCA case; it was decided under Pennsylvania law. However, like the FTCA, Pennsylvania law does not permit mental incapacity to toll the statute of limitations. Addressing the statute of limitations, Judge Lord stated:

> The general rule is that in determining the reasonableness of a person's conduct, his or her illness or physical disability can be considered in defining the standard which he or she must meet, but that a mental deficiency cannot be taken into account. *Restatement (Second) of Tort* §§ 283B, 283C (1968). *Accord*, W. Prosser, The Law of Torts § 32, at 151-54 (1971).

453 F.Supp. at 768. In *Greenberg*, plaintiff sought treatment from the defendant psychiatrist for a "mild neurotic condition", and presented proof that as a result of defendant's negligent treatment she suffered permanent psychosis and minimal to moderate organic brain damage. 453 F.Supp. at 770.

Barren essentially asserts two injuries, one which occurred during his tour of duty in Korea and the other, the aggravation of the first, which occurred at the hands of the V.A. It is the second injury which is the subject of this law suit. This mental condition affected his ability to understand that, as he now contends, the second injury occurred.

Thus, the court finds that Barren's cause of action was not barred by the statute of limitations. Taking into account all of the relevant circumstances, the court finds that through the exercise of reasonable diligence, plaintiff could not have discovered his injury prior to October 1977, and that the statute of limitations did not begin to run until that date. Thus, his administrative action, filed September 7, 1979, was timely filed.

The same is not true of Henrietta Barren, who has filed a claim in her own right. Plaintiffs have offered no evidence, nor can the court educe any evidence from the record, to show why she did not discover or, through the exercise of reasonable diligence, should have discovered, the injury claimed and its cause. The claim of Henrietta Barren in her own right is barred by the statute of limitations.

The Malpractice Claim

Proceeding to the merits of plaintiff's claim, the court finds the following:

1. During the period from June 22, 1970, through January 2, 1972, plaintiff John Barren was on active duty in the United States Army, which included a tour of duty at Camp Casey, Korea, lasting approximately 13 months. (Undisputed fact set forth in pleadings).

2. About six months into his stay in Korea, John Barren's personality began to change. He became anxious and scared. (TR. 15, 16).

3. Upon his discharge from the service, John Barren was given a prescription of Librium and was told to report to the nearest Veterans Administration Hospital within ten days. (TR. 46).

4. John Barren was in distress upon his arrival home. He refused to talk to his family but remained in his room and cried. At times his whole body shook. (TR. 18-19, 44).

5. During the fist six months after his discharge, Barren visited the V.A. Hospital in Wilkes-Barre frequently. He received medications prescribed for his conditions. (TR. 22).

6. John Barren was treated by Dr. George Anghel of the Veterans Administration Hospital in Wilkes-Barre, Pennsylvania, who made file notations when John Barren presented himself for out-patient psychiatric consultation.

7. According to those notations, Barren appeared at the Veterans Administration Hospital in Wilkes-Barre, Pennsylvania for such out-patient psychiatric consultations on or about August 15, 1972, December 22, 1972, February 26, 1973, March 26, 1973, and April 1, 1974. (Plaintiff's Ex. 1).

8. Dr. Anghel acknowledged that when a patient comes to the out-patient clinic without an appointment, sometimes a physician prescribes drugs and the visit is recorded on a Form 1010 and not placed on the Physician Progress notes. (TR. 171, 174). Such records were not contained in John Barren's medical file. Exhibit 1.

9. During his visits to the V.A. Hospital, John Barren was given prescriptions for Valium, Librium or Mellaril. (TR. 53).

10. Mrs. Barren visited the V.A. Hospital in March or April of 1972 and spoke to Dr. Anghel about John's condition. She was accompanied by her daughter Henrietta. (TR. 25).

11. Mrs. Barren described John Barren's symptoms to Dr. Anghel. She said that her son was nervous, that he shakes and that he never sleeps. (TR. 25-26). She asked that her son be hospitalized. (TR. 27).

12. Dr. Anghel informed Mrs. Barren that John did not need to be hospitalized but that he was going thorugh a period of adolescence. (TR. 27-28).

13. Henrietta Barren found it difficult to communicate with Dr. Anghel. She felt Dr. Anghel would not listen to her and more importantly, Dr. Anghel had difficulty speaking English. (TR. 55). *See also* TR. 185.

14. Henrietta Barren also described her brother's condition to Dr. Anghel. (TR. 51). Specifically, she

narrated outbursts of crying, erratic sleeping habits, tremors and heart palpitations. (TR. 51, 75).

15. During 1972 and 1973, John Barren began to self medicate with alcohol because he believed it was the only way he could interact with other people. (TR. 59, 120, Hurst deposition 124).

16. During this time John Barren's medical condition continued to deteriorate prompting another visit to the V.A. Hospital by Mrs. Barren and her daughter in December of 1973. (TR. 28).

17. At that time, the administrator of the Veterans Administration agreed to review the decision to admit John Barren into the hospital. (TR. 61, 63, 28, 31. *See* Plaintiff's Exhibit 8.

18. On January 11, 1974, John Barren was denied admission to the V.A. Hospital because in the opinion of the physicians at the V.A., John Barren did not need to be hospitalized. (TR. 63) (Plaintiff's Exhibit 8).

19. The family never refused to have John Barren admitted to the Veterans Administration Hospital in Wilkes-Barre. (TR. 64, 76).

20. In the early part of 1974, John Barren's condition deteriorated to the point that in the eyes of his family, he was a danger to himself and to his family. (TR. 64).

21. On January 24, 1974, John Barren was admitted to the Scranton State Hospital. (TR. 67). He was subsequently released at the request of his family, so that he could get better medical care. (TR. 68).

22. John Barren was admitted to the Abington Memorial Hospital on February 18, 1974, under the care of Dr. Hurst. (TR. 70).

23. John Barren was subsequently released from the Abington Memorial Hospital on March 3, 1984 because of the financial strain on the family. (TR. 71, 106, Hurst deposition page 21).

24. Barren was hospitalized from June 26 through July 26, 1974, at the Eastern Pennsylvania Psychiatric Institute under the care of Dr. Hurst. (TR. 71, Exhibit 4).

25. On June 24, 1981, John Barren was declared incompetent by the Court of Common Pleas of Lackawanna County. (TR. 72).

26. In April of 1974, John Barren made his last visit to the Veterans Adminsitration Hospital in Wilkes-Barre. Due to the financial situation of the family, he went to the V.A. to obtain assistance in refilling Dr. Hurst's prescription. (TR. 76).

27. In 1973, John Barren filed a claim seeking benefits from the Veterans Administration relative to anxiety neuroses. On October 20, 1977, John Barren was awarded service connection and a thirty percent disability rating retroactive to February 26, 1973.

28. John's disability rating was increased to fifty percent in March of 1979. It was made retroactive to August 23, 1977, which was the date of the evaluation of his only hospitalization at a V.A. facility. On October 18, 1984, John Barren was awarded one hundred percent disability rating for anxiety neurosis by the Verterans Administration.

29. Dr. Anghel received his medical education in Bucharest and Vienna. (TR. 130-133).

30. He completed his formal medical education in Vienna but was not licensed to practice there and could only work under supervision. (TR. 33).

31. Dr. Anghel then took E.C.F.M.G. examination, passage of which would allow his European training to be recognized in the United States. (TR. 134).

32. The examination did not test oral communication skills. (TR. 134).

33. Dr. Anghel interned at Mary Immaculate Hospital in New York in 1967 but was not licensed to practice medicine in the state of New York. (TR. 138).

34. Dr. Anghel then worked for the Delaware State Hospital, St. Barnabas Hospital and Warren State Hospital where he was always supervised by other physicians. (TR. 138, 139, 140).

35. All of Dr. Anghel's actual training and treating of patients at Delaware and Warren State dealt with chronic psychotic patients. (TR. 141, 142).

36. Dr. Anghel could not prescribe drugs for patients at Mary Immaculate Hospital, St. Barnabas Hospital, or Delaware State Hospital. (TR. 140, 142).

37. Dr. Anghel was licensed to practice medicine in Pennsylvania in 1970 and hired by the Veterans Administration Hospital in Wilkes-Barre in July of 1971. (TR. 143).

38. At the Veterans Administration in Wilkes-Barre, Dr. Anghel, for the first time, was not supervised by other physicians. (TR. 145, 146).

39. Dr. Anghel is not board certified in psychiatry. (TR. 159).

40. Dr. Anghel listed the symptoms of anxiety neurosis that he relied on in making his decision, *inter alia,* as follows: tense, unable to relax, loss of interest in usual activities, bad mood, sleep disturbances, fatigue, headaches, trembling, cardio vascular palpitations, eating habits. (TR. 152, 153).

41. Dr. Anghel testified that anxiety neurosis could explain why cardio vascular palpitations occurred even without showing up on the EKG. (TR. 154).

42. Dr. Anghel claimed that the manifestation of a skin rash is not relevant to a determination of anxiety neurosis. (TR. 156).

43. In 1972, according to Dr. Anghel, the V.A. Hospital was short physicians, but not understaffed, and Dr. Anghel stated he "didn't work too hard." (TR. 161).

44. Dr. Anghel testified that it was "not too ethical for a treating physician to make an evaluation of a claim." (TR. 164).

45. Despite the ethical considerations, and the denial of understaffing, Dr. Anghel, John Barren's treating physician, made an evaluation of John Barren's claim for disability based on anxiety "because there was no one else around to do it." (TR. 164, 226).

46. Dr. Anghel testified that it is important for the treatment of anxiety neurosis for the doctor to establish a relationship with the patient (TR. 183, 184). Dr. Anghel testified that "psychiatry is mainly an art of talking to people, the using of language, the main tool is language." (TR. 184).

47. The Barrens had a difficult time communicating with Dr. Anghel because of his difficulty with English. (TR. 55).

48. Dr. Anghel did not test to see how the drugs affected his patient, he did not monitor the use of the drugs, nor did he coordinate the prescriptions with other doctors, nor did he reach out and try to talk to the family, despite the fact that he recognized that each of these factors was an important facet of treatment. (TR. 186, 188).

49. The medical records of the Veterans Administration (Exhibit 1) show that on January 12, 1972, John Barren was diagnosed to be suffering from mild anxiety. The medical records of the Veterans Administration also show that a clinical impression of the electrocardiograph record states the source of palpitations as anxiety. (TR. 193, 194).

50. John Barren was taking nerve medicines prescribed by Dr. Hannigan when Dr. Anghel examined him in August of 1973. (TR. 197).

51. Dr. Anghel reviewed John Barren's medical records prior to seeing him in August of 1972. Anxiety is noted twice in those records (TR. 193, 194, 195).

52. In August of 1972, Dr. Anghel diagnosed John Barren as suffering from an alcohol addiction, but did not prescribe any treatment. (TR. 198, 200, 201).

53. With reference to John Barren's subjective complaints, Dr. Anghel stated that he did not write down every "nonsense" when making notes in August of 1972. (TR. 199).

54. Dr. Anghel's testimony was inconsistent on several occasions, including:

a) Dr. Anghel testified that in August of 1972, John Barren did not show signs of anxiety but he later testified that Barren had anxiety which was increased by alcohol; (TR. 202, 203).

b) Dr. Anghel did not know that John Barren was receiving prescriptions from Dr. Potelunas, another doctor at the Veterans Adminstration Hospital in Wilkes-Barre, (TR. 205); however, Exhibit 1 which Dr. Anghel claims to have reviewed before beginning treatment clearly states that Barren was receiving such medications; and

c) When Dr. Anghel examined John Barren again in December of 1972, he found that John Barren was, *inter alia,* nervous, had a slight tremor of the hands (a clear sign of anxiety neurosis according to Dr. Anghel TR. 153), and made a claim of depression.

55. Dr. Anghel saw John Barren in February of 1973 and gave him a prescription of Mellaril 25 milligrams, three times a day. He did not prescribe any follow up visit or attempt to monitor the prescription, and Dr. Anghel had no treatment plan because he claims he was not going to treat him again. (TR. 215, 218).

56. Despite his statement, Dr. Anghel treated John Barren again in March of 1973 but again Dr. Anghel had no diagnosis, no treatment plan, no monitoring of the drugs, and no notes on how the drugs were affecting John

Barren. However, he did give him a new prescription of Mellaril. (TR. 220, 221).

57. Dr. Anghel stated that John Barren had a low I.Q. which would prevent him from getting hospitalized therapy, yet there is no record that he ever tested Barren's I.Q. (TR. 222, 223).

58. Dr. Anghel further testified that John Barren made bizarre statements and because of that was not sophisticated enough for hospitalization. (TR. 223).

59. In May of 1973, Dr. Anghel made a compensation exam of John Barren to determine if he suffered from a nervous condition. (TR. 229).

60. It was not common practice at the V.A. for a treating physician to conduct a compensation exam; specifically, if Dr. Anghel had made a determination of a nervous condition in relation to the claim for compensation, this would be contradictory to all of his prior diagnoses and treatments. (TR. 229).

61. Prior to the examination by Dr. Anghel, John Barren was given a physical examination (TR. 230). John Barren listed his complaints: nervous feeling, unsteady hands, can't sit still, outbreaks of red blotchy patches on body, on face, appetite poor, very hyper, impatient, sleep varies off and on. (TR. 231).

62. Despite these symptoms, and the fact that his symptoms parallel the list provided by Dr. Anghel as indications of anxiety, Dr. Anghel testified he noted nothing that changed his prior diagnoses. (TR. 153, 234, 235).

63. Dr. Anghel claims that he did not see John Barren between May of 1973 and April of 1974. All of Dr. Anghel's notes concerning the need to hospitalize John Barren made in April of 1974 were made only after he had learned that John Barren was hospitalized and under the care of Dr. Hurst. (Tr. 240, 243).

64. Dr. Burton Fleming testified as an expert witness for the plaintiffs. Dr. Fleming graduated from Temple University Medical School and did his Psychiatric Residency training at Temple University Medical Center; he served as an Airforce psychiatrist; he received a Master of Science degree in Psychiatry from Temple; he is board certified in Neurology and Psychiatry; he was medical director of the Northwestern Institute of Psychiatry and the Horsham Psychiatric Hospital in Philadelphia. He is an associate and clinical professor of clinical psychiatry at Temple. He has served as a consultant to the Veterans Administration. He is a consultant to the Pennsylvania Psychiatric Society to review claims for determining whether or not treatment was warranted. He has written articles addressing questions concerning the criteria for hospitalization. He has been qualified as an expert in the psychiatric field of medicine in state and federal court. (TR. 261, 262, 265).

65. Dr. Fleming reviewed Plaintiffs' Exhibits 1 through 4, and sat in the courtroom during the testimony of the Barrens and Dr. Anghel. (TR. 267).

66. Dr. Fleming stated that there were frequent references in the records of the V.A. Hospital to indicate that John Barren had a problem with anxiety and that he displayed a sufficient array of symptoms with a sufficient degree of severity to warrant treatment and investigation. (TR. 269).

67. Dr. Fleming outlined these symptoms: tremors, palpitations, his stated nervousness, and his request for electro-convulsive therapy. Barren asked bizarre questions, had difficulty with respect to work and social relationships, fear of people, insomnia, skin rashes, poor appetite. (TR. 270).

68. Dr. Fleming stated that the progression of medication prescribed by Dr. Anghel, from a mild tranquilizer to Mellaril, does not indicate an improvement as stated by Dr. Anghel. (TR. 271).

69. Dr. Fleming stated that John Barren's use of alcohol was an attempt to self-medicate and to overcome his anxiety. (TR. 272).

70. Dr. Felming stated that in his professional opinion, within a reasonable degree of medical certainty, the care rendered to John Barren at the Veterans Administration Hospital during the years 1972 and 1973 was below the accepted standard of care for psychiatric treatment. (TR. 269).

71. Dr. Fleming stated that John Barren should have been hospitalized in 1972. (TR. 273, 279).

72. Dr. Fleming stated that John Barren would be in a better mental and physical state today if he would have received adequate treatment in 1972 and 1973. (TR. 274).

73. Dr. Fleming testified that Dr. Anghel's failure to monitor and control the drugs he was prescribing for John Barren was below the accepted medical standard for the prescription of such drugs. (TR. 276).

74. Dr. Fleming testified that the fact that Dr. Anghel did not request family contact in the years 1972 and 1973 was an act which itself was below the generally accepted medical standard for treating psychiatric patients. (TR. 278).

75. Dr. John Lesniak also testified as an expert witness for the plaintiffs. He is a graduate of the University of Scranton, attended the Jefferson Medical College, and interned at the Misericordia Hospital in Philadelphia. He took additional training in psychiatry at Binghamton State Hospital and Upstate Medical Center in Syracuse, New York. He had been clinical director of psychiatry and the assistant superintendent of Clarks Summit State Mental Hospital. He is engaged in private practice of psychiatry in Scranton. He is board certified and has qualified as an expert in both state and federal courts. (TR. 299, 300).

76. Dr. Lesniak had reviewed Plaintiffs' Exhibits 1 through 4 and had an opportunity to talk with Henrietta Barren, Mrs. Joseph Barren and John Barren himself. (TR. 304).

77. Dr. Lesniak testified that it is important in the treatment of mental disorders to reach out and obtain information from the patient's family and to monitor any psychotropic drugs given to patients. (TR. 303).

78. Dr. Lesniak testified that the care rendered to John Barren by the Veterans Administration in Wilkes-Barre during the years 1972 and 1973 within a reasonable degree of medical certainty is below the accepted standard of care for psychiatric treatment. (TR. 304).

79. Dr. Lesniak testified that the standard treatment for John Barren in 1972 and 1973 would have been hospitalization. (TR. 306).

80. Dr. Lesniak testified that the failure of the Veterans Administration to render standard treatment to John Barren is a contributing factor to his present condition. (TR. 305).

81. Dr. Lesniak further testified that John Barren did not have a good insight into his illness and infirmity during the years 1972 and 1973. (TR. 306).

82. Dr. Lesniak testified that Dr. Anghel should have monitored his prescriptions of Mellaril and Valium as given to John Barren. (TR. 307).

83. Dr. Lesniak testified that Dr. Anghel diagnoses of May of 1973 were incorrect. (TR. 315).

84. Dr. Lesniak stated that the treatment provided by Dr. Anghel during his May 1973 examination was inadequate. (TR. 321).

85. Dr. Lesniak testified that if John Barren had been hospitalized during the early phases of his illness his chances for survival would have been much better. (TR. 327).

86. The only defense witness called by the U.S. government was Dr. James R. Harris, M.D., an employee of the Veterans Administration. (TR. 331). Dr. Harris testified that his testimony was based solely on the records of the Veterans Administration. (Plaintiffs' Exhibit 1) (TR. 337).

87. Dr. Harris testified that he would be "very, very careful" about allowing a doctor who was not board certified to have unsupervised admission power at a Veterans Administration Hospital because he did not want patients treated by improperly trained or inadequate physicians. (TR. 340-341).

88. Dr. Anghel was not board certified and was not supervised at the V.A. Hospital in Wilkes-Barre. (TR. 159, 145).

89. Dr. Harris admitted that after reviewing John Barren's examination of May 9, 1973, he would have treated him psychiatrically. (TR. 346).

90. Dr. Anghel said he would not and did not treat him psychiatrically. (TR. 234-235).

91. Dr. Harris stated that his standards of admissions included "if a person's behavior was suspicious and the person was desirous of being admitted." (TR. 350).

92. Dr. Harris stated that if Dr. Anghel was John Barren's primary physician, he would have to do more for his patient than what was indicated in his notes. (TR. 352).

93. Dr. Harris stated that Dr. Anghel should have verified through collateral sources medication received by John Barren from other physicians. (TR. 354).

94. Dr. Harris stated that the August 1972 records of Dr. Anghel reflect that John Barren manifested symptoms of anxiety neurosis and not alcohol addiction.

95. Dr. J. Paul Hurst did not testify at trial but his deposition was admitted into evidence. (TR 6). He was

qualified as an expert in the field of psychiatry during his deposition. (D-9).

96. Dr. Hurst testified that he hospitalized John Barren immediately after his first examination in April of 1974. (D-16).

97. Dr. Hurst testified that he would have preferred to keep John Barren hospitalized longer at the Abington Memorial Hospital in April of 1974 (D-24) and that at the time John Barren was discharged he was not capable of working. (D-21).

98. Dr. Hurst describes through his conversation with John Barren the same symptoms provided to Dr. Anghel by the Barrens in 1972. He stated, "he had become so anxious, even if someone came to his house where he was living with his family, he would essentially not be able to join the conversation with people. He would tend to stay by himself. He would go out with someone, say either his sister or his brother, and they would go to a bar or some public place, he would become progressively more agitated and feel people were looking at him and talking about him, and he must abruptly leave or might make some inappropriate comment to a person he thought was looking at him and cause a disturbance. . . . this chronic constant agitation, anxiety nervousness that interfered with his ability to think, to relax, to function socially or work effectively."

99. In the summer of 1974, Dr. Hurst admitted John Barren to the Pennsylvania Psychiatric Institute, and after testing, diagnosed him as suffering from anxiety neurosis. (D-27).

100. Dr. Hurst described John Barren's condition of anxiety neurosis as permanent, and stated that it will effect his longevity. (D-42, 46).

101. Dr. Hurst stated that within a reasonable degree of medical certainty his opinion was that John Barren was incapable of appreciating his condition and the fact that it had deteriorated between 1972 and 1974. (D-55).

102. Dr. Hurst further opined that within a reasonable degree of medical certainty the deterioration of John Barren's condition during the period of 1972 to 1974 was a substantial contributing factor to John's inability to appreciate his condition. (D-55, 56).

103. Dr. Hurst further stated that within a reasonable degree of medical certainty John Barren was incapable of recognizing his own deterioration between 1972 and 1974. (D-57, 58).

104. Dr. Hurst further testified that one of the reasons John Barren was hospitalized was to aid in establishing the doctor-patient relationship. (D-61). All the doctors testified that this relationship was an essential part of the treatment.

105. Dr. Hurst testified that his explanation for the statement on the discharge sheets from the Abington Memorial Hospital concerning John's ability to work was a goal that he hoped to achieve, but in fact, John Barren was incapable of work (D-80, 81).

The court recognizes that two of plaintiffs' experts, Dr. Fleming and Dr. Lesniak, did not examine John Barren (although Dr. Lesniak did meet with him). However, they had before them the medical records from the relevant time period and the information provided by Barren's mother and sister. The court also recognizes that Henrietta Barren, although a witness, has an interest in this litigation. While the court finds here testimony credible it also notes that the strength of the testimony is colored by her role as an advocate for her brother. However, there is nothing in this record to indicate that the information provided to Drs. Fleming and Lesniak differed in any material way from that provided by the family to Dr. Anghel during their efforts to communicate with him.

In suits brought pursuant to the Federal Tort Claims Act, liability is determined according to the law of the place where the alleged act or omission occurred. *Garber v. United States*, 578 F.2d 414, 415 (D.C.Cir. 1978); *Smith v. United States*, 437

F.Supp. 1004 (E.D.Pa. 1977). Therefore, in the instant case, Pennsylvania law is applicable.

The obligation of the V.A. to provide medical care and treatment is set by statute. 38 U.S.C. § 601, *et seq.* Thus, the V.A. may furnish hospital care to any veteran for a service-connected disability or to any veteran for a non-service connected disability if the veteran is unable to otherwise pay for necessary hospital care. 38 U.S.C. § 610. In addition, medical services found to be reasonably necessary to any veteran for a service-connected disability, may be provided. 38 U.S.C. § 612. "Disability" is defined as a "disease, injury, or other physical or mental defect." 38 U.S.C. § 601(1).

The fact that the cited statutory authority is couched in permissive rather than mandatory terms is not dispositive here. Defendant did undertake to render medical and hospital care. Pennsylvania courts have adopted Section 323 of the Restatement (Second) of Torts. *Hamil v. Bashline,* 481 Pa. 256, 392 A.2d 1280 (1978). This section provides that

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Thus, once someone undertakes to render services, he must do so with reasonable care. Failure to do so renders the negligent person liable in damages. This principle is applicable to medical malpractice cases such as the one at bar. *Hamil v. Bashline, id.*

The standard of performance applicable in a medical malpractice action is that of a reasonable prudent man engaged in that specialty. *Incollingo v. Ewing,* 444 Pa. 263 (1971);

Kubrick v. U.S., 435 F.Supp. 166 (E.D.Pa. 1977), *rev'd. on other grounds,* 444 U.S. 111 (1979); *Ciccarone v. U.S.*, 350 F.Supp. 554 (E.D.Pa. 1972), *aff'd* 468 F.2d 253 (3d Cir. 1972). Thus, defendant is expected to demonstrate that degree of skill, learning and care normally possessed or used by the average physician who devotes special study and attention practicing in that specialized field. To prevail, then, plaintiff must demonstrate through expert testimony that the defendant departed from this standard. *Brannan v. Lankenau Hospital,* 490 Pa. 588 (1980); *Hamil v. Bashline, supra.*

In the instant case, the testimony of plaintiffs' experts showed that defendant breached this duty in two respects. First, defendant failed to diagnose and treat plaintiff in a proper manner by failing to provide in-patient hospital care when such care was warranted under the circumstances. John Barren came to the V.A. Hospital with a condition which warranted a period of in-patient hospitalization to properly evaluate, diagnose and treat. Instead, he was referred to the out-patient clinic for care. It is clear from the records and from the testimony of Dr. Anghel that this decision was not based on eligibility requirements but on the determination by the V.A. that such in-patient treatment was not warranted.

Secondly, plaintiffs demonstrated through the testimony of their experts that, notwithstanding the V.A.'s negligent determination that in-patient treatment was not required, the out-patient care rendered to John Barren was substandard. Several deficiencies are evident from the testimony and in this court's findings. Dr. Anghel gave Barren prescriptions which progressed from Librium to Mellaril while maintaining that Barren simply needed to "grow up." Dr. Anghel acknowledged the importance of taking a patient history and reaching out to the patient's family for information, yet he not only failed to do so here but actually rebuffed the family when they came to him. He recognized the need to develop a doctor-patient relationship, yet he failed to do so in this case, going so far as to characterize the information relayed to him by John Barren as "nonsense." And, while this court cannot say that Dr. Anghel has any difficulty understanding English, it was evident during the trial, some eighteen years after Dr. Anghel began to

practice medicine in the United States and some thirteen years after John Barren first saw him at the V.A. Hospital, that Dr. Anghel has difficulty communicating in English, a factor which may have contributed to his inability to relate to his patient. Upon review of the record and the testimony presented at trial, it is apparent to this court that, in violation of the appropriate standard of care, *the defendant made no meaningful effort to diagnose Barren's condition or to treat it in the proper manner.* That is, certain of John Barren's symptoms were medicated, but no effort was made to treat the cause of the problem in order to effect a cure. *The defendant breached its duty to plaintiff John Barren.*

The government would have the court believe that because plaintiff's treating physician, Dr. Hurst, prescribed similar medications and eventually treated Barren as an outpatient, that he provided the same treatment as the V.A. and thus the V.A. cannot be held liable. This argument is without merit. Plaintiff's physician began treatment with an extended period of hospitalization for purposes of assessment and diagnosis and released John Barren to out-patient care only when his family indicated that it could no longer afford to continue in-patient treatment. He followed up with a second, more lengthy hospitalization and monitored Barren's treatment and use of medication. The court cannot find any meaningful similarities between the treatment afforded Barren by Dr. Hurst and the "handling" of plaintiff by the V.A.

Plaintiff must also prove that defendant's conduct was the proximate cause of his injury. *Hamil v. Bashline, supra* at 265 (citations omitted). *The test of proximate cause is met in a medical malpractice case when the plaintiff demonstrates through expert testimony that there is a reasonable degree of medical certainty that the defendant's conduct increased the risk that the harm sustained by plaintiff would occur.* 481 Pa. at 273. In so holding, the *Hamil* court relied on Section 323 of the Restatement (Second) of Torts. *See also, Jones v. Montefiore Hospital,* 494 Pa. 410 (1981). Thus, a defendant may be liable if his negligence either was a substantial factor in bringing about the harm suffered or increased the risk of the harm

suffered and that increased risk was a substantial factor in bringing about the harm. *Brozana v. Flannigan*, 309 Pa. Super. 145, 454 A.2d 1125 (1983); *Hoeke v. Mercy Hospital of Pittsburgh*, 299 Pa. Super. 47, 445 A.2d 140 (1982). *In the instant case, defendant's health care employees were negligent in their management and care of John Barren. This clearly increased the risk that the problem would entrench and become chronic and, in fact, that is what happened.* The expert testimony presented has shown that this increased risk was a substantial factor is bringing about the harm suffered by John Barren. As stated by Dr. Lesniak during the trial:

> "... if Mr. Barren were hospitalized ... during the early phases of this particular emotional upheaval, that his chances for survival—again, emotional survival—would have been much better, and his chances of becoming a productive citizen today would have been much better ..."

TR. 327.

Finally, the government argues that Pennsylvania law effectively immunizes the defendant from liability. Pursuant to the Pennsylvania Mental Health and Mental Retardation Act of 1966,

> No person and no governmental or recognized non-profit health or welfare organization or agency shall be held civilly or criminally liable for any diagnosis, opinion, report or anything done pursuant to the provisions of this act if he acted in good faith and not falsely, corruptly, maliciously or without reasonable cause, provided, however, that causes of action based upon gross negligence or incompetence shall not be affected by the immunities granted by this section.

50 P.S., Section 4603 (1966 Special Session No. 3, October 20, P.L. 96, Art. VI, Section 603.) This section was repealed by Act 1978 Nov. 26, P.L. 1399 No. 330, Section 502, insofar as inconsistent with said Act, but sovereign immunity was reaffirmed. Section 4(a) of Act 1978, Sept. 28, P.L. 788, No. 152, repealed this section insofar as it waives or purports to waive sovereign immunity inconsistent with the Act, but saved this

section from repeal insofar as it provides defenses or immunities from suit. *See* 1986 Cumulative Annual Pocket Part, 50 P.S. Section 4603.

Under the Mental Health Procedures Act 50 P.S. Section 7101 *et seq.*, Section 7114 provides:

> (a) In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, but the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment shall not be civilly or criminally liable for such decision or for any of its consequences . . . 1976, July 9, P.L. 817, No. 143, Section 114, effective in 60 days, as amended 1978, Nov. 26, P.L. 1362, No. 324, Section 1, effective 60 days.

Again, Section 4(a) of Act 1978, Sept. 28, P.L. 788, No. 152 repealed this Section insofar as it waives or purports to waive sovereign immunity inconsistent with the Act, but saved this Section from repeal insofar as it provides defenses or immunities from suit. *See* 1986 Cumulative pocket Part, 50 P.S., Section 7113.

Since the enactment of the Mental Health Procedures Act of 1976 (50 P.S. § 7101, *et seq.*) the immunities provided by 50 P.S. § 4603 are limited to treatment of the mentally retarded and no longer apply to treatment of the mentally ill. *Venesky v. Community Medical Center,* 30 D. & C. 3d 96 (1984). Therefore, only the latter of the cited sections, 50 P.S. § 7114 is even potentially relevant to this action.

It is clear that 50 P.S. § 7114 is applicable only to admission and discharge decisions. It affords no immunity for an individual physician's method or manner of treatment of a

patient after the initial decision to provide such treatment has been made. *Venesky* at 101, *citing Saunders v. Latrobe Area Hospital, Inc.,* 14 D. & C. 3d 458, 465-6 (1980). Thus, the section has no applicability to the second breach alleged and proven by plaintiff. Further, immunity is granted only to *individuals* who participate in the decision to treat. *Venesky* at 100-101. The named defendant in this case is the United States of America. No individual was named as a defendant. Dr. Anghel, the V.A. physician involved in this case, appeared only as plaintiff's witness. Therefore, the immunity provided by Pennsylvania statute does not apply.

The court thus finds defendant liable to plaintiff John Barren. The trial in this case was bifurcated on the issues of liability and damages. A date for trial on the issue of damages will be set by order of this court.

Sylvia H. Rambo
United States District Judge

Dated: July 23, 1986

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1064

JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM AND ORDER

On July 23, 1985, judgment was entered in the captioned matter in favor of the defendant as to the claim of Henrietta Barren on the issue of liability. Judgment was entered in favor of John Barren against defendant on the issue of liability.

On November 19, 1986, a non-jury trial was held on the issue of damages. The record was further supplemented on December 15, 1986 with sumission by the defendant of the video tape deposition of Dr. Robert L. Sadoff.

The plaintiff John Barren suffers from a chronic anxiety disorder. He has been adjudicated incompetent to handle his financial affairs by the state courts. He is able to take care of his personal hygiene, drive a car, wash clothes and dishes, go shopping, make change and is aware of current events. The plaintiff is not likely to ever hold a job and he cannot function totally independently or become totally self-sufficient. It is not likely that his chronic condition will improve. It is disputed by the doctors as to whether future hospitalization will be required.

At the present time plaintiff resides with his aging and ill mother and his sister. Any future living arrangements will require some daily supervision, although a group home situation would or could develop problems in that plaintiff would have difficulty dealing with other residents in a group home. Furthermore, a group home is not likely to provide him with a long term residency.

Plaintiff seeks damages in the following categories: housing, live-in companion, health insurance, travel expenses, management consultant, future lost earnings, medical expenses, pain and suffering, and reimbursement of services rendered by Henrietta Barren.

The claim for housing, health insurance, management consultant, medical expenses and reimbursement of services by Henrietta Barren will be denied.

Housing

There is no question that John Barren will require housing at some future time. He currently lives with his very ill mother and sister. The disposition of the house at Mrs. Barren's death is unknown and it is not likely that Henrietta and John could live in the same household considering the present state of animosity that exists between them. As previously noted, it is not likely that John Barren could thrive in a group home considering his condition. Counsel for plaintiff has concurred that if plaintiff receives an award for future lost earnings, he would be required to supply his living expenses from those earnings. Counsel argues that plaintiff would still be entitled to receive compensation for housing representing the difference between a one-bedroom apartment and a two-bedroom apartment. The latter allegedly will be required because plaintiff will require a live-in companion. There is nothing on the record to indicate that the plaintiff would otherwise choose a one-bedroom apartment over a two-bedroom apartment under normal conditions. Furthermore, as discussed later, John Barren has not satisfied this court that his condition requires a live-in companion twenty-four hours a day. Consequently, the claim for damages for the cost difference between a one-bedroom and a two-bedroom apartment is denied.

Medical Expenses

The United States, for the last nine years, has paid for plaintiff's medical care in its entirety and will continue to pay the same as long as plaintiff is at least 50% disabled. These costs are paid even though medical services are derived from private services.

In *Brooks v. U.S.*, 337 U.S. 49 (1949), the Supreme Court held.

> Provisions in other statutes for disability payments to their survivors . . . indicate no purpose to forbid tort actions under the Tort Claims Act. . . . But this does not mean that the amount payable under servicemen's benefit laws should not be deducted or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act.

Id. at 53. The Court goes on to say that the government should not have to pay twice for the same injury. This court shares the concerns of plaintiff that at some point in time the U.S. will either withdraw its benefits or require plaintiff to give up his private care for V.A. care. It is noted that the U.S. has provided its current level of medical payments for nine years. Any change in the U.S. current level of medical support is subject to agency procedural rules as well as constitutional substantive and procedural due process. Medical benefits over and above that being supplied by defendant is denied.

Management Consultant

Plaintiff seeks compensation for the cost of a management consultant. This person or agency would arrange the plaintiff's trips to the doctor, be liason between the V.A. and the insurance carrier, would supervise the daily care of the plaintiff, fill out government and insurance forms, etc. These tasks seem to be duplicative of the tasks that can be done by a paid companion. Furthermore, plaintiff has a guardian for his estate—Henrietta Barren. Should she find the management of plaintiff's financial affairs difficult, she can petition the county court to substitute a bank in her stead. It appears unnecessary to have a consultant on the facts of this case.

Henrietta Barren's Claim

Even though this court previously dismissed the claim of Henrietta Barren, plaintiff still seeks recovery for her claims. He does so by claiming that he is liable to his sister for the services she rendered on his behalf. There is no proof of record that John Barren incurred the costs claimed by Henrietta Barren or contracted to pay her for those services. To compensate John Barren for costs allegedly incurred by Henrietta would permit her to get through the back door what she has been denied at the front door. Plaintiff does not support this claim in law or in fact. John Barren has not incurred nor otherwise obligated himself to pay the costs listed on plaintiff's exhibits 5 and 5A. In the absence of any contractual obligation, a relative's assistance and aid is deemed gratuitous. 17 C.J.S. *Contracts* § 90 (1963) ("where services are rendered and benefits conferred without any request and under circumstances rendering lack of expectaion to be compensated therefore highly improbable, no obligation to make such compensation arises . . .").

Medical Insurance Premiums

Plaintiff seeks as a measure of damage the cost of health insurance premiums over his life expectancy. The total loss earnings figure of $1,100,000.00, hereinafter discussed, includes fringe benefits of 12.5%. Consequently, the claim for health benefits is covered in the earnings loss benefit and this claim will be denied.

Lost Earnings

There is evidence of record that plaintiff was trained and certified as an operating engineer. Plaintiff received a certificate of completion as a heavy-equipment operator from the Northeast Tranining Institute dated March 17, 1970. (Plaintiff's Exhibit 1). There is no evidence of record that he ever performed such work but in 1978 he was hired by Addy Asphalt Company ostensibly as a heavy-equipment operator, which services he never performed. (Plaintiff's Exhibit 7). While there was no testimony by a vocational expert that, but

for plaintiff's mental condition, he could have performed such a course of employment, there is adequate evidence that he qualified to perform such work, was hired to perform such work and sufficient psychiatric testimony that his condition now precludes performance of such work. (N.T. Nov. 19, 1986, p. 18; Deposition of Dr. Sadoff, Dec. 12, 1986). *See, Riddle v. Anderson,* 85 Pa. Cmwlth. 271, 175, 481 A.2d 382, 384 (1984).

It is stipulated on the record that Barren's work loss valuation would be 1.1 million dollars based on his employment as an operating engineer to the year 2011. John Barren is currently receiving disability compensation which, at today's level, annualized over his life expectancy would amount to $615,168,000. Defendant argues that this amount should be deducted from the future work loss value. It appears that defendant's position is correct. In *Smith v. U.S.,* 587 F.2d 1013 (3d Cir. 1978), the court discussed the collateral source doctrine. The court concluded that the determination of whether funds constituted a collateral source and not subject to a reduction from an award under the FTCA depended upon whether the benefits came from unfunded general revenues of the United States or whether they came from "[a] special fund supplied in part by the beneficiary or a relative upon whom the beneficiary is dependent" (citations omitted). *Id.* at 1015, 1016. It would appear that the disability payments would be deductible. *See also Christopher v. U.S.,* 237 F.Supp. 787 (E.D.Pa. 1965) and *Schwartz v. U.S.,* 230 F.Supp. 536 (E.D.Pa. 1964). Consequently, plaintiff will be granted an award of lost future earnings based on work life expectancy reduced by the government disability compensation over the same period of time.

It is noted, however, that the government computes the set-off in terms of life expectancy. The set-off is adjusted as follows. Basic compensation: $1,335 × 12 = $16,020 annually. The difference between life expectancy and work-life expectancy is 13.4 years. Life expectancy disability compensation = $615,168 – $214,668 = $400,500, to be deducted from work loss compensation.

Transportation

Plaintiff's claim for transportation will be granted. The record indicates that the defendant is currently reimbursing plaintiff for his travel expenses incident to obtaining medical treatment at the rate of $.11 per mile. The current government rate is $.205 per mile. While it is not clear from the record, it can be inferred therefrom that the future mileage is estimated at 363,600 miles. (N.T. Nov. 19, 1986, pp. 121-22). At $.205 per mile, the amount of plaintiff's mileage expenses would be approximately $74,500.00. Paying this amount to plaintiff relieves defendant of any future liability for mileage reimbursement.

Live-In Companion

There remains as an item of compensatory damages the cost of a live-in companion. As previously stated, it does not appear that group home accommodations would be feasible for the plaintiff, either for health reasons or for the long duration for such special housing needs. It also appears from the record, however, that perhaps constant 24 hour supervision may not be required. Planitiff is not totally dysfunctional. He can drive a car (T.R. 64), and he visits his relatives without supervision (T.R. 63), goes shopping (albeit with some guidance), cares for his personal hygiene and assists his mother with household chores. Consequently, this court does not believe that the cost of a 24 hour companion is warranted. Plaintiff produced testimony that a 24 hour companion would cost $1,134,726.00. It is the opinion of this court that John Barren does not need 24 hour supervision, nor constant daily supervision. Modified daily supervision to see that his medical appointments are maintained, his apartment and needs cared for (groceries, laundry, etc.), is adequate for the condition of this plaintiff. The figure awarded will take these factors into consideration.

Pain and Suffering

The most difficult aspect of the damage claim to assess is the claim for pain and suffering. It must be emphasized that this court has never had the opportunity to observe or hear from the plaintiff. Plaintiff was absent from all phases of the

trial because it was thought to be in the best medical interest of the plaintiff. Nevertheless, it places a severe burden on the fact finder to properly determine the elements of pain and suffering and to assess their value.

From the testimony of plaintiff's sister and his psychiatrists, the following appear to be the elements of pain and suffering in this case: 1) plaintiff is unable to carry on meaningful employment; 2) plaintiff is unable to socialize, *i.e.*, he cannot function around people, inside or outside the home, except on a limited basis; 3) plaintiff is unable to completely take charge of his own life; and 4) plaintiff has endured mental anguish.

While these elements appear to be significant, this court does not believe that they are all so significant as plaintiff's claim. The fact finder is quite concerned that there may be elements of faking and exaggeration on the part of plaintiff. (Sadoff Video Deposition). Furthermore, the court has some concern as to how much of plaintiff's present inability to live independently has been aggravated by his family's dominance of plaintiff's daily activities (N.T. Nov. 19, 1986, pp. 34, 35), and the lack of therapy to deal with this problem.

In light of the foregoing, IT IS HEREBY ORDERED THAT plaintiff is awarded the sum of $1,124,000 computed as follows:

Lost Earnings	$699,500
Companion Services	$250,000
Mileage.....	$ 74,500
Pain and Suffering	$100,000

The Clerk of Court is directed to enter judgment in favor of the plaintiff, John Barren, and against the defendant, United States of America in the sum of $1,124,000.

IT IS FURTHER ORDERED THAT said sum less costs of suit and counsel fees, shall paid to an approved financial institution as trustee for John Barren. John Barren shall receive the net income therefrom and so much of the principal as necessary for his maintenance and support as shall be deemed necessary in the joint discretion of his trustee and natural guardian, keeping in mind the allocation of the award made by this court.

Sylvia H. Rambo
United States District Judge

Dated: March 13, 1987

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 87-5314

JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN,

v.

UNITED STATES OF AMERICA,
Appellant.

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civil No. 81-1064)

Argued November 2, 1987
Before: SLOVITER, BECKER, and COWEN*,
Circuit Judges
(Filed February 23, 1988)

SAL COGNETTI, JR. (ARGUED)
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* At the time this case was argued, Judge Cowen was a United States District Judge for the District of New Jersey sitting by designation. On November 16, 1987 he entered on duty as a United States Circuit Judge.

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OPINION OF THE COURT

COWEN, Circuit Judge.

This appeal is from an order which entered judgment in favor of plaintiff awarding damages on a claim of medical malpractice, brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* Since plaintiff failed to file his notice of claim within two years after its accrual, as required by 28 U.S.C. § 2401(b),[1] and the time in which he had to make his claim was not tolled or otherwise excused, his claim was time-barred. We therefore will reverse the judgment in plaintiff's favor.

[1] The section states:

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1982).

I.

Plaintiff, John Barren, enlisted in the United States Army on June 22, 1970. After completing basic training, he was sent on a tour of duty in Korea, arriving in November of 1970. Barren was stationed at Camp Casey, in the demilitarized zone, which was considered hazardous duty. Over the next thirteen months, he experienced increasing amounts of nervousness and anxiety, and his condition worsened to the point that on January 2, 1972, he was transferred to Fort Lewis, Washington. During the trip home, Barren was given librium (a tranquilizer) by military personnel, presumably in an effort to temporarily relieve his condition. Upon arriving at Fort Lewis, he was medically discharged and was advised to seek a physical examination at a Veterans Administration ("VA") hospital.

Barren returned to Pennsylvania on January 5, 1972, and on January 12 reported to the VA hospital in Wilkes-Barre, Pennsylvania, complaining of heart palpitations and a skin rash. Due to his recent separation from active duty, the VA informed Barren that he was eligible for treatment pending a final determination whether his illness was service related. On January 17, 1972, he was again examined at the VA hospital and prescribed medication. The preliminary diagnosis was heart palpitations and anxiety.

In early August of 1972, Barren had a psychiatric out-patient consultation with Dr. George Angehel of the VA. Dr. Anghel, who was not board certified in psychiatry, diagnosed plaintiff as suffering from adolescent adjustment syndrome, and prescribed librium and valium. Dr. Anghel treated Barren on an out-patient basis on four other occasions, each time continuing to prescribe tranquilizers.

On January 24, 1973, on the basis of Dr. Anghel's diagnosis, the VA determined that the skin condition Barren had developed was service related, but that his anxiety problem was not. It therefore denied his disability claim for the anxiety condition. Barren sought reconsideration of this decision and, as part of the review process, was again examined by Dr.

Anghel on May 9, 1973.[2] Dr. Anghel reported his condition as "adjustment reaction of adolescence." On July 6, 1973, based on Dr. Angehel's report in which he opined that Barren's personality was healthy and that he did not need hospitalization, the VA denied his disability claim. On August 2, 1973, the VA informed Barren it had determined that his nervous condition was not service related. Barren again appealed, this time to Mr. Watson, Chief of Admissions at the VA hospital. While this appeal was pending, Barren's family continued to seek hospitalization on his behalf and reported to Dr. Anghel that he was uncontrollable and needed immediate psychiatric hospitalization. The Chief of Admissions, after consulting with Dr. Anghel, denied Barren's request for hospitalization on January 11, 1974. In late January of 1974, Barren's family admitted him to the Scranton State Psychiatric Hospital for treatment of his alcoholism, a condition he developed in an effort to self-medicate. He was released on February 1, 1974, as the treatment was unsatisfactory to his family.

On February 18, 1974, Barren was placed in the care of Dr. J. Paul Hurst, who immediately admitted him to Abington Memorial Hospital, where he was diagnosed as suffering from immature personality disorder, depression neurosis and chronic lumbosacral sprain. Barren was released from Abington on March 3, 1974, when his family could no longer bear the financial burden of in-patient treatment. Thereafter and continuing to the present, Dr. Hurst has continued to treat Barren on an out-patient basis, with the exception of another hospitalization at the Eastern Pennsylvania Psychiatric Institute lasting from June 26 until July 26, 1974, at which time Barren was diagnosed as having anxiety neurosis.

On October 30, 1977, the VA reversed its prior decision and determined that Barren's anxiety condition was service related. The VA awarded Barren a 30 percent disability

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[2] The district court noted that review of a disability claim by an applicant's treating physician is not standard VA procedure, and Dr. Anghel admitted that this practice was "not too ethical." In this case, however, Dr. Anghel performed the evaluation because there was no other doctor available at the time. App. at 26, 38.

retroactive to February 26, 1973. This rating was subsequently increased to 50 percent on March 15, 1979, and to 100 percent on October 18, 1984.

Barren filed his administrative tort claim on September 7, 1979, alleging medical malpractice. Barren's sister, Henrietta Barren, filed a tort claim on the same date, seeking reimbursement for medical related expenses she incurred on behalf of her brother. This suit was filed on September 15, 1981. Barren and his sister, Henrietta Barren,[3] alleged that the VA had negligently failed to admit him to the hospital for in-patient care, and that the treatment he was given was substandard. The United States moved to dismiss because the claims were not timely filed. The district court declined to dismiss, preferring to reserve decision until after the liability portion of Barren's case. After hearing all the evidence, the district court did dismiss the claims of Henrietta Barren as time-barred, but refused to do so as against Barren.[4]

The district court determined that Barren's dismished mental condition, which condition resulted from defendant's malpractice, was a factor which could be considered in assessing the reasonableness of his diligence in discovering the malpractice. App. at 32. The court concluded that Barren's mental condition affected his ability to understand that an injury had befallen him. Id. at 33. The district court further concluded that Barren, unlike his sister, through the exercise of reasonable diligence could not have discovered his injury prior to October 1977—the date he was notified of the VA's decision to amend his disability to 30 percent service related. *Id.* This

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[3] Henrietta Barren filed this suit, not only in her own right to recover the funds she spent to cure her brother, but also on behalf of her brother for whom she was appointed guardian in June of 1981.

[4] The district court found as to Henrietta Barren's claim in her own right, that evaluating her knowledge of the existence of the injury (Barren's obvious mental deterioration) as well as the probable cause of that injury (failure of the VA to promptly hospitalize and properly treat his mental and nervous disorder), she was aware of the accrual of the cause of action well before the two years that she filed the administrative claim. In evaluating her knowledge the district court correctly judged her by the reasonable person standard.

appeal followed findings by the district court of medical negligence by the government and damages sustained by Barren.

II.

The fundamental issue raised in this appeal is when does the statute of limitations run on a FTCA medical malpractice claim, when the plaintiff proves that the medical negligence of the government so affected his mental facilities that the was incapable of perceiving the negligence of the government. The answer to this question is determined by the date on which this Court determines such a cause of action accrues under 28 U.S.C. § 2401(b). The district court's findings of fact in this regard will be left undisturbed unless clearly erroneous. *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985). However, where the decision of the district court involves the application and interpretation of legal precepts, this Court's review is plenary. *D & G Equip. Co. v. First Nat'l Bank,* 764 F.2d 950, 954 (3d Cir. 1985).

III.

The United States Supreme Court has in general terms addressed the issue of when a medical malpractice claim accrues under the FTCA in *United States v. Kubrick,* 444 U.S. 111 (1979). In *Kubrick,* the plaintiff sustained a partial hearing loss allegedly as a result of neomycin treatment administered for a femur infection. Thereafter, Kubrick sought the advice of other doctors, who advised him as early as January of 1969 that it was "highly possible" that the neomycin treatment had caused his deafness. 4444 U.S. at 114. The district court in *Kubrick* held that the claim was timely because it was filed within two years after plaintiff spoke with yet another doctor, in June 1971, who stated that "neomycin had caused [Kubrick's] injury and should not have been administered." *Id.*

In *Kubrick* the district court determined that the plaintiff was not subject to the usual discovery rule because he had demonstrated that "he had exercised reasonable diligence and

had no "reasonable suspicion" that there was negligence in his treatment." *Id.* at 116 (quoting *Kubrick v. United States,* 435 F. Supp. 166, 185 (E.D. Pa. 1977). We affirmed, *Kubrick v. United States,* 581 F.2d 1092 (3d Cir. 1978), holding that the statute of limitations is tolled "if the plaintiff can prove that in the exercise of due diligence he did not know, nor should he have known, facts which would have altered a reasonable person to the possibility that treatment was improper . . . ." *Id.* at 1097. The Supreme Court reversed, the majority finding nothing in the language or the legislative history of the FTCA to support our holding that Kubrick's claim only accrued when he new or reasonably could have known that his neomycin treatment was medically substandard. Rather, the Court, recognizing that it was not free to enlarge the statute of limitations so as to frustrate the intent of Congress to promptly dispose of FTCA claims, refused to toll the limitations period for plaintiffs who possess the necessary facts to pursue a claim. The Court stated:

> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government. If there exists in the community a general applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. . . . But however or even whether he is advised, the putative malpractice plaintiff must determine within the period whether to sue or not, which is precisely the judgment that other tort claimants must make.

4444 U.S. at 123-24 (footnote omitted).

The Supreme Court concentrated on the objective aspects of the test; that is, the Court was not concerned with whether the plaintiff actually knew of the malpractice, but whether he possessed the facts such that, as a reasonable person, he should have known of the malpractice. *Id.; accord Nemmers v. United States,* 795 F.2d 628, 631 (7th Cir. 1986). In the case presently before us, the district court determined that Barren was only placed on notice that his disability was service related when the VA changed its position and awarded Barren a 30 percent disability rating on October 20, 1977.[5] App. at 29. It is clear to us, however, that based on the record below Barren possessed facts which would have enabled a reasonable person to discover the alleged malpractice well before this date.[6]

It is not disputed that plaintiff was denied admission by the VA on several occasions beginning in December of 1972, despite the intervention of his family. App. at 35. It is also obvious that his condition gradually worsened during this period. *Id.* at 35-36. Plaintiff's condition eventually deteriorated to the point that he sought outside medical treatment from Dr. Hurst in February 1974. *Id.* at 36. It was at this point that an objectively reasonable person in Barren's position could have recognized that the treatment he had received from the VA was not adequate, and that he had been harmed as a result.

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[5] We fail to see how this decision by the VA in and of itself could have placed Barren on notice that his were related to the VA's malpractice, especially when the change of position by the VA was not accompanied by an explanation. The change in status from zero to 30 percent represents the opinion of the VA that plaintiff's condition partially related to his service in the armed forces, but would not necessarily imply an admission on the part of the VA that his condition was related to VA malfeasance. We therefore are of the opinion that the district court's finding that Barren was placed on Notice as of October 1977 by reason of this change in status is unsupported by the evidence.

[6] We must emphasize that Barren's situation cannot be characterized as one akin to a perpetration of a fraud or a continuing treatment by a physician, or the development of a transference relationship by a patient with her doctor (as in *Greenberg v. McCabe,* 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd* 594 F.2d 854 (3d Cir.), *cert. denied,* 444 U.S. 840 (1979)), which might mask the malpractice and excuse the failure to timely file a claim. Rather, this case involves an act or acts of malpractice which were temporally limited and which did not continue.

The very fact that Barren sought treatment outside the VA is a clear indication that he believed the treatment provided by the VA was unsatisfactory. Moreover, the testimony of all the experts at trial was to the effect that the treatment given plaintiff by the VA during the years 1972-73 was inadequate and that he should have been hospitalized. *Id.* at 43-46. Indeed, the essence of Barren's claim is that because the VA failed to admit him for observation and treatment, his condition resulting from service in Korea retrogressed from moderate to total psychiatric disability. There is no reason why this opinion of malpractice could not have been elicited as early as 1974. In fact, the district court found that there was no reason why Barren's sister, Henrietta Barren, did not discover or through the exercise of reasonable diligence should not have discovered the injury and its cause at an earlier date. *Id.* at 33. Viewing Barren's sister as an objectively reasonable person, her failure to timely interpose a claim under the FTCA is indicative of the very same failure on the part of Barren to timely file his claim.[7]

IV.

Admittedly, the VA's malpractice was a substantial factor in Barren's inability to recognize that very malpractice. The undisputed evidence before the district court was that Barren could not recognize his condition and its deterioration between 1972 and 1974, and that the deterioration was a substantial factor in his inability to appreciate his condition, *Id.* at 47. The *Kubrick* Court acknowledged the difficulty that a plaintiff might have in discovering an act of medical malpractice, but nonethe-

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[7] If Barren's sister had been appointed guardian prior to 1981, her knowledge would have been imputed to him, and Barren would thereafter have been precluded from arguing that the VA's negligence prevented him from discovering the malpractice. A deliberate delay in the appointment of a guardian, under plaintiff's view of the statute of limitations, could allow an incompetent plaintiff to circumvent the statute of limitations. There is no reason why such a delay in the appointment of a guardian should work to the detriment of the government.

less dismissed this as an excuse for allowing plaintiffs a lesser standard for complying with statutes of limitations:

> [D]etermining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.

4444 U.S. at 124.

Although the VA's exacerbation of Barren's infirmity, and the causal relationship between this aggravation and plaintiffs inability to recognize his condition is a compelling reason to excuse his deficiency in failing to file his claim, as *Kubrick* makes clear, the rule cannot be subjectively applied. Allowing Barren to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations. Such extensions have uniformly been rejected by this and other courts of appeals. *See Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 360-61 (3d Cir. 1986) (Federal Employer's Liability Act claim); *Accardi v. United States*, 435 F.2d 1239, 1241 n.2 (3d Cir. 1970); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976); *Williams v. United States*, 228 F.2d 129, 132 (4th Cir. 1955), *cert. denied*, 351 U.S. 986 (1956) (Admiralty Act claim).

We recognize that our holding in this case visits a harsh result of the plaintiff. However, limitations periods must be strictly construed, especially those involving a waiver of sovereign immunity. *Kubrick*, 444 U.S. at 117-18; *Soriano v. United States*, 352 U.S. 270, 276 (1957); *United States v. Sherwood*,

312 U.S. 584, 590-91 (1941). As the Supreme Court has conceded:

> It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been.

444 U.S. at 125. We feel compelled by the Court's holding in *Kubrick* to construe the statute of limitations narrowly. As the *Kubrick* Court noted, if Congress desires to expand the limitations period in cases where the government's own negligence prevents a plaintiff from recognizing her injuries caused by that conduct, it is free to do so. *Id.* The courts are not so empowered.[8]

V.

We hold that the court incorrectly applied the legal standard in assessing the timeliness of plaintiff's claims under section 2401(b), and in effect improperly tolled the statute of limitations. Because plaintiff's claim was not timely filed, and the running of the statute of limitations on an action brought against the United States is a jurisdictional defect not subject to waiver, *see e.g., Deakyne v. Department of Army Corps of Engineers,* 701 F.2d 271, 274 n.4 (3d Cir.), *denied,* 464 U.S. 818 (1983); *Rosales v. United States,* 824 F.2d 799, 802 (9th Cir. 1987); *Houston v. United States Postal Service,* 823 F.2d 896, 902 (5th Cir. 1987); *Walters v. Secretary of Defense,* 725

[8] The government also argues that the district court erred in refusing to allow the United States the benefit of immunity granted to all private individuals under the Pennsylvania Mental Health and Mental Retardation Act of 1966. 50 Pa. Cons. Stat. Ann. § 4603 (Purdon 1969) (repealed 1978), or the Mental Health Procedures Act of 1976. 50 Pa. Cons. Stat. Ann. § 7114 (Purdon Supp. 1987). In light of our holding as set forth above we need not reach this issue.

F.2d 107, 112 n.12 (D.C. Cir. 1983), the district court is divested of jurisdiction under 28 U.S.C. § 1346(b). We therefore will reverse the district court's judgment and remand. The district court will enter judgment in favor of the United States. Each party to bear its own costs.

SLOVITER, *Circuit Judge,* concurring.

I agree that the district court erred in rejecting the government's affirmative defense of the statute of limitations, but because my analysis differs somewhat from that of Judge Cowen, I write separately.

It is undisputed that as a result of his Army experience in Korea, plaintiff John Barren suffers from a disability, which the district court described as chronic anxiety disorder. App. at 56. Indeed, the Veteran's Administration awarded plaintiff a thirty percent disability rating retroactive to February 26, 1973, increased it to fifty percent as of August 23, 1977, and awarded him 100% disability on October 18,1984. At issue is whether plaintiff had an unfortunate service-connected disability, or when it became totally disabling, but whether plaintiff is entitled to damages of $1,124,000 awarded him by the district court for defendant's malpractice.

Plaintiff's tort claim, in essence, is that the malpractice of the United States was committed between August 1972 and April 1974 when Dr. George Anghel misdiagnosed Barren's condition as a mere adolescent adjustment reaction and prescribed tranquilizers rather than the appropriate treatment of hospitalization which had been requested by John's sister, Henrietta, who consulted directly with Dr. Anghel on John's behalf.

The Federal Torts Claim Act (FTCA) provides that:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

28 U.S.C. § 2401(b)(1982).

Barren must show that his claim accrued less than two years before presentation of his claim. Barren's administrative claim was not presented to the United States until September 7, 1979. His sister also presented her own claim on that date for medical expenses made on his behalf.

As the district court correctly recognized, "a claim under the FTCA accrues when a plaintiff knows both the existence and cause of his injury," citing to *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979), App. at 30. Applying this rule, the district court held that the claim of Herietta Barren in her own right was barred by the statute of limitations because there was no evidence why she did not discover or through the exercise of reasonable diligence should not have discovered the injury claimed and its cause. App. at 33.

The district court, however, distinguished between Henrietta and John Barren. The court held that John Barren's "mental condition affected his ability to understand that" the Veteran's Administration aggravated the injury that he had suffered as a result of his tour of duty in Korea. App. at 32-33. According to the district court, "plaintiff's mental condition at the time of the allegedly negligent conduct, and which resulted from that conduct, may be considered part of the external circumstances under which the reasonableness of a plaintiff's diligence in discovering the wrong must be assessed." App. at 32. Although I recognize the attractiveness of this position, I believe it runs counter to the applicable law and legal precedents.

Plaintiff concedes that "with limited exceptions not applicable here, the existence of a mental capacity [sic] does not toll the running of the statute of limitations under the FTCA." Brief for appellee at 24 (footnote omitted). Nonetheless, plaintiff argues that the district court was justified in considering plaintiff's mental incapacity as "one of the many factors" to be weighed in determining the reasonableness of plaintiff's diligence in discovering the cause of his injury.

The distinction made by the district court is illusory. The basis for the general rule that the statute of limitations will not be tolled for either infancy or insanity, *see* 2 L. Jayson,

Handling Federal Tort Claims: Administrative and Judicial Remedies §§ 297.02-.03 (1987), stems from the prevailing reasonable person standard used to determine when the claim, particularly a medical malpractice claim, should have been discovered. *See, e.g., Kubrick*, 444 U.S. at 123 n.10 (plaintiff must exercise "reasonable diligence"); *Urland v. Merrell-Dow Pharmaceuticals, Inc.*, 822 F.2d 1268, 1275 (3d Cir. 1987) (Pennsylvania inquiry is "whether plaintiffs knew or reasonably should have known"). The standard is an objective one, consistent with the purpose of the FTCA to "encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. Neither the plaintiff nor the district court cities any persuasive authority for applying a subjective standard, *i.e.*, reasonableness as viewed from the plaintiff's individual situation. In fact, precisely such a subjective standard was rejected in *Kubrick*, where the Supreme Court, in reversing this court's holding of when a claim accrued for purposes of the FTCA statute of limitations, held an "untutored plaintiff" to the same standard as a "reasonable person". *See id.* at 118.[1]

Inclusion of a plaintiff's mental incapacity as a factor to be considered in determining the reasonableness of plaintiff's diligence runs counter to this general approach. Indeed in this case, the *only* factor that distinguished plaintiff's situation from that of his sister was his mental incapacity. Since that interposes an impermissible subjective element into the reasonable person standard, *see* Restatement (Second) of Torts, §§ 283B, 283C (1964), the district court's reliance on the plaintiff's mental incapacity was legal error.

Plaintiff also argues that the usual discovery rule should be relaxed because "the injury sustained by (him) at the hands of the defendant was an aggravation of a pre-existing condition." Brief of appellee at 29. I fail to see how a principled distinction

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[1] Both the district court and plaintiff rely on the district court's opinion in Greenberg v. McCabe, 453 F. Supp. 765, 768 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert denied*, 444 U.S. 840 (1979), where the court held that plaintiff's mental condition is a factor to be weighed in determining the time of discovery. *Greenberg preceded the Supreme Court's decision in Kubrick* which rejected use of a subjective factor.

can be made for purposes of the statute of limitations between a plaintiff whose mental disability was caused by defendant's negligence and one whose mental disability was aggravated by defendant's negligence. In either case, plaintiff's failure to file a timely claim may have resulted from his or her inability to recognize or appreciate the factors which form the basis of the claim. Logic requires that both situations should be treated similarly. Since both the district court and plaintiff concede that mental disability as such is not a basis for relaxing the statute of limitations, it follows that aggravation of that mental disability cannot afford such a basis.

It may be that when the negligence of the defendant impairs the ability of a plaintiff to take the necessary measures to file a claim, fairness requires that we relax the rule.[2] That, however, is an issue for Congress. We cannot, as the dissent suggests, change the statute in order "to circumvent the obvious injustice of the result." Dissent Typescript op. at 6. Indeed, in *Zeleznik v. United States*, 770 F.2d 20, 24 (3d Cir. 1985), this court, applying *Kubrick*, noted that the two-year limitations period in the FTCA reflects Congress' determination of what is a reasonable time for injured parties to make a claim. We commented that "the statute of limitations is meant to be applied in a uniform manner," and that the statute "does not

[2] All parties agree that this case is unlike the coma situation, *see e.g.*, Washington v. United States, 769 F.2d 1436, 1438-39 (9th Cir. 1985), and Clifford by Clifford v. United States, 783 F.2d 977, 979-80 (8th Cir. 1984), and hence we need not reach that issue. However, in light of the dissent's extensive reliance on these cases, we note that even in those cases the courts distinguished the extraordinary situation presented when plaintiff has been in a coma or has been lobotomized from a case such as this alleging some lesser level of mental incapacity. *See e.g.*, Zeidler v. United States, 601 F.2d 527.531 (10th Cir. 1979) ("We say also that brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity for the purpose of barring such attraction"). *See also* Dundon v. United States, 559 F.2d 469, 474 (E.D. NY. 1983) Although Judge Becker reads Clifford by Clifford v. United States 783 F.2d 977 (8th Cir. 1984), differently than do I, I note that *Clifford* quoted verbatim the language of *Dundon*, expressly interposing the reference to Allen Clifford and describing his extraordinary situation. "*Id.* at 980. The court in *Clifford*, as in the two cases cited above, distinguished Allen Clifford's situation from that of ordinary mental incapacity, *Id.*

guarantee that every injured party will necessarily be able to find and make a claim against a possibly responsible governmental agency." *Id.*

Because the only basis for the district court's failure to apply the FTCA's statute of limitations was Barren's mental incapacity, and that is an impermissible basis. I also vote to reverse the judgment for plaintiff entered by the district court.

BECKER, *Circuit Judge,* dissenting.

I have no disagreement with Judge Cowen or Judge Sloviter concerning the general rule governing the statute of limitations for medical malpractice under the *Kubrick* standard—the two year statute of limitations begins to run when a reasonable person should have known of the injury and its cause. Moreover, I freely concede that, generally speaking, the jurisprudence construing the statute of limitations under the Federal Tort Claims Act (FTCA) is not very pliable. The caselaw does not admit of tolling the limitations period by reason of infancy or mental disability or a number of other individualized traits that could reasonably interfere with the two events that, as I have noted, start the statute running: discovery of the injury and discovery its cause. I part company with my colleagues, however, in their assessment that this is another in a line of sorry cases in which we have no power to circumvent the harsh dictates of the statute of limitations under the FTCA.

I believe that the majority has overstated and misapplied the *Kubrick* standard, I am persuaded that this case falls within a narrow, yet recognized equitable exception to the *Kubrick* general rule. Under this exception, the statute of limitations under the FTCA does not accrue for a plaintiff whose ability to perceive that the government injured him was destroyed by the government's negligent care until the plaintiff is affirmatively informed of the injury in a way he can understand, or until a guardian is appointed. The government concedes that Barren was unable to perceive his injury and that the government's negligent treatment of Barren aggravated his condition and contributed to that inability. And yet, in extending the *Kubrick* rule to the facts of this case, the majority has ignored two key

factors that set Barren's case apart: 1) that this is an aggravation case where determining what a reasonable person would know is inherently very difficult; and 2) the government itself is responsible for Barren's inability to perceive his own mental deterioration.

I.

A. *Aggravation*

It is essential, at the threshold, to identify and discuss the precise nature of Barren's injury. His injury was the worsening of his mental condition caused by his negligent treatment by the VA, including its failure to diagnose his condition, misprescription of medication, counterproductive advice to Barren and his family, and failure to admit Barren for in-hospital observation and diagnosis.

Barren's mental illness began with his tour of duty in *Korea.* His mental problems became worse because, as the district court noted, "the defendant made no meaningful effort to diagnose Barren's condition or to treat it in the proper manner." J.A. at 51. Dr. Anghel, who was not board certified in psychiatry and was practicing for the first time without supervision, provided substandard care. Despite the pleas of Barren's mother and sister, Barren was fed a heavy diet of tranquilizers and pep-talks, and was assured that he need only to "grow up." Barren's medication was not monitored, and Dr. Anghel dismissed as "nonsense" many of Barren's serious subjective complaints (*e.g.,* anxiety, sleeplessness and crying fits).

Because the actual injury was the *further deterioration* of Barren's condition from mentally ill but nevertheless functioning, to totally incapacitated because of mental illness, the *Kubrick* standard is very difficult to apply. *See Augustine v. United States,* 704 F.2d 1074, 1078 (9th Cir. 1983) ("[w]hen a physician's failure to diagnose, treat, or warn a patient results in the development of a more serious medical problem than that which previously existed, identification of both the injury and its cause may be more difficult for a patient than if affirmative conduct by a doctor inflicts a new injury"); *Greenberg v.*

McCabe, 453 F. Supp. 765, 772 (E.D. Pa. 1978) *aff'd without op.,* 594 F.2d 854 (3d Cir.), *cert. denied,* 444 U.S. 840 (1979) ("where the injury and cause thereof are subtler and more complicated than in the normal malpractice case, it seems particularly inappropriate to determine as a matter of law what the plaintiff should have known") (footnote omitted).

Judge Cowen makes much of the fact that Barren left the VA to seek outside help, and contends that this fact provides evidence that Barren knew or at least should have known of his injury and its cause. See maj. op. typescript at 11. But the mere switching of physicians does not necessarily impute knowledge of injury and the source of that injury. *See Nicolazzo v. United States,* 786 F.2d 454 (1st Cir. 1986) (distinguishing the facts of *Kubrick* and holding that plaintiff's awareness that VA physicians were not aiding him did not constitute knowledge of injury and its cause). Furthermore, in applying the *Kubrick* standard, Judge Cowen does not account at all for the subtleties of an aggravation case. The notion that changing doctors does not necessarily establish discovery of negligence seems particularly true in an aggravation case, where the plaintiff already knows that he is sick and may not have any means for differentiating negligent care from the natural progression of the disease. Therefore, even under the rigid reasonable person standard that the majority adopts, I do not think it can confidently be said that Barren should have known of his injury.

B. *The Government's Responsibility*

Second, and more important, I do not think the *Kubrick* standard should apply at all under the special facts of this case, where, as the lead opinion concedes, "the VA's malpractice was a substantial factor in Barren's inability to recognize that very malpractice." Maj. op. typescript at 12. This case arrives to us in an unusual and compelling posture: because the district court held a trial on the merits before determining the statute of limitations questions, we are not dealing with alleged negligence but rather with *proven* negligence by the VA, which the government does not challenge on appeal. The district court accepted the plaintiff's argument "that John Barren was at all

times during [the relevant] period unable to comprehend that his mental condition had deteriorated while he was under the care of the V.A. medical personnel and that the deterioration was caused by the treatment received at the hands of the V.A." J.A. at 29. There is thus no question that the poor care Barren received exacerbated his mental illness, directly contributed to his present mental incapacity, and most important, prevented him from understanding the nature or source of his injury.

Basic principles of equity dictate that the government cannot profit from its own negligence. At bottom my reasoning derives from the simple and compelling precept that the government cannot render someone unable to comprehend his injury and then impose a reasonable person discovery rule. The majority's emphasis upon the objective-subjective distinction in *Kubrick* is simply misplaced in this context. It ignores the added special factor of the government's participation in Barren's inability to comprehend his injury and its cause. In recognizing the unique and pernicious effect of the government's malpractice, we do no harm to the basic *Kubrick* discovery rule. Rather, we carve a narrow exception that prohibits the government from insulating itself from its own wrongful activity.

Barren's special situation strikes me as significantly distinguishable from mere mental incapacity which does not, in and of itself, toll the statute of limitations under the FTCA. The added factor here of the government's causation of that mental incapacity changes the rules of the game. I agree with Judge Bramwell in *Dundon v. United States,* 559 F. Supp. 469 (E.D.N.Y. 1983), where he considered the government's argument based on a strict interpretation of the *Kubrick* rule and observed that

> [t]o treat this case as one involving mere mental incompetency in the general sense proffered by the government is to lose sight of the decedent's extraordinary situation. The decedent's mental condition, allegedly caused by his treating physicians, directly prevented his understanding the nature and cause of his injuries.

Id. at 474.

Other courts have managed to circumvent the obvious injustice of the result the lead opinion and concurrence reluctantly advance. Two lines of cases support the notion that where the government itself is responsible for the plaintiff's admitted inability to perceive the worsening of his condition, the suit will not be time barred. The first consists of coma cases, where the plaintiff's lack of consciousness is directly attributable to the government's negligence.[1] The second involves malpractice by therapists who violate the transference relationship by engaging in sexual relations with their patients thereby causing severe mental distress and aggravating a pre-existent mental illness. I discuss them in turn.

1. The Coma Cases

In *Clifford by Clifford v. United States,* 738 F.2d 977 (8th Cir. 1984), a comatose patient represented by his guardian-father, sued the United States for malpractice stemming from a drug overdose. The court held that the statute of limitations accrued when his father was appointed as guardian, and not, as the government contended, when the patient fell into the coma. Judge Arnold, speaking for the court, analogized *Clifford's* case to *Zeidler v. United States,* 601 F.2d 527 (10th Cir. 1979), where the statute of limitations did not run for someone who was lobotomized by the government until a conservator was appointed on his behalf. As Judge Arnold explained, in both cases the government had "destroyed those plaintiffs' capacities to realize the existence and cause of their injuries." *Clifford,* 738 F.2d at 979. Essentially, the court in *Clifford* held that as a matter of fairness the statute of limitations must be tolled lest the government "profit from its own (alleged) wrong." *Id.* at 980. The court specifically held that because the patient had reached the age of majority and had not yet been declared

[1] Judge Sloviter in her concurrence correctly notes that the parties have agreed (as did the district court) that these coma cases do not apply. Barren, of course, was successful below and, I presume, did not wish to challenge on appeal the district court's reasoning, given that its decision was in his favor. However, the coma cases are before us both in the district court opinion and the government's brief. Because they materially enhance the analysis and discussion of this very troubling question. Barren's concessions cannot foreclose their consideration.

legally incompetent, the knowledge of his family members could not be imputed to the patient himself. Furthermore, the court observed that tolling the statute of limitations in the case of a coma "does not disturb in any way [the] well recognized-rules" that ordinarily the statute of limitations is not tolled for infancy or mental incapacity and that its holding was fully consonant with *Kubrick*. *Id.* at 980.

Similarly, in *Washington v. United States,* 769 F.2d 1436 (9th Cir. 1985), the court, citing *Clifford,* held that the cause of action accrued when the comatose plaintiff finally died, not when she entered her fourteen-year coma. The court reasoned that the plaintiff satisfied the rule because she was never aware of her injury or its cause. *Id.* at 1439. The court specifically held that the knowledge of plaintiff's husband was irrelevant to her ability to bring suit. *Id.* at 1438. *See also Dundon v. United States,* 559 F. Supp. 469 (E.D.N.Y. 1983) (tolling the statute of limitations for medical malpractice under the FTCA where government negligently sent plaintiff into a coma).[2]

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[2] In her concurrence, Judge Sloviter contends that the coma cases themselves distinguished the extraordinary situation of a coma and lobotomy from some lesser level of mental incapacity. Concurring Op. at n.2. I make two responses. First, the two cases upon which I rely most heavily, *Washington* and *Clifford,* make no such distinction. In particular, I disagree with Judge Sloviter's characterization of the *Clifford* case. Although it is true that the case takes note of Allen Clifford's "extraordinary situation." It seems clear to me, that in quoting the language of *Dundon,* the *Clifford* case perceives the "extraordinary situation" to be the government's causation of the plaintiff's inability to perceive his injury. The *Clifford* case explains:

> And, while mental incompetence generally does not toll the statute of limitaions.
>
> > [t]o treat this case as one involving mere mental incompetence in the general sense proffered by the government is to lose sight of [Allen's] extraordinary situation. [His] mental condition, allegedly caused by his treating physicians, *directly prevented* his understanding the nature and cause of his injuries. *Dundon, supra* 559 F.Supp. at 474. (Emphasis suppled).

Clifford 738 F.2d at 980. This interpretation is bolstered by the fact that the *Clifford* case supplied the emphasis to this quote from *Dundon,* thereby focusing on the question of the government's causation.

Second, to the extent that *Zeidler* and *Dundon* do note their extraordinary facts, the reasoning derived from those cases is nevertheless directly on point where, as here, the government concedes that the plaintiff was unable to detect his mental deterioration because of the government's negligence.

2. The Transference Cases

The second line of cases involves malpractice by a mental health therapist who by engaging in sexual relations violated the transference relationship with his patient.[3] In *Simmons v. United States,* 805 F.2d 1363 (9th Cir. 1986), the Court of Appeals for the Ninth Circuit held that the statute of limitations had not run on a patient who sued her government sponsored counsellor for malpractice for wrongfully engaging her in sexual relations during the course of her treatment. The court held that the two year statute of limitations under the FTCA only began to run once she had been informed by another therapist that the source of her present injury (deep depression, attempted suicide) stemmed from her meretricious relationship with her former therapist. *Id.* at 1367. The court discussed the nature of the transference phenomenon at great length, explaining that given the special patient-therapist relationship, the court could not hold that the plaintiff reasonably should have known of her injuries any earlier. *Id.* The high degree of dependence and trust of the patient on her therapist, it was held, prevented a patient from understanding the nature of her injury or its cause.

In *Greenberg v. McCabe,* 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd without op.,* 594 F.2d 854 (3d Cir.), *cert. denied,* 444 U.S. 840 (1979), Judge Joseph S. Lord, III considered a similar question under Pennsylvania's law of psychiatric malpractice. Although this case preceded *Kubrick,* and is not an FTCA case, it applied the same standard as the *Kubrick* discovery rule. The court inquired into when the plaintiff, in exercise of reasonable diligence, should have discovered her

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[3] As the Simmons court explained:

> Transference is the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist and is "generally applied to the project of feelings, thoughts and wishes onto the analsyt who has come to represent some person from the patient's past".

805 F.2d at 1364 (quoting Stedman's Medical Dictionary 1473 (5th Lawyers' Ed. 1982)). When a therapist abuses the transference relationship and becomes sexually involved with a patient the result is as devastating psychologically as an incestuous relation 805 F.2d at 14365.

injury and its cause. 453 F. Supp. at 768. It noted the deep dependence of the plaintiff on her therapist and the assurance by the therapist and that their sexual encounters were part of her therapy. In rejecting defendant's motion for a judgment n.o.v., Judge Lord explained that the jury could have inferred that the extreme dependence of the plaintiff on her therapist and the therapist's improper behavior impeded the plaintiff's "powers of judgment" and that she "neither knew nor by objective standards could have known under those circumstances" the nature of her injury or its cause. *Id.* 771-772. The court explained: "At issue is the objective effect of the defendant's [conduct] on discoverability by a reasonable person . . . the statutory period does not begin to run if . . . the plaintiff's failure of discovery, objectively determined, is brought about by the very nature of the defendant's conduct." *Id.* at 769 & n.1. *See also Person v. Kieffer,* 634 F. Supp. 892 (E.D. Pa. 1986) (evidence that attack by police dog may have caused psychological difficulties impeding plaintiff's memory tolled applicable two-year Pennsylvania tort statute for suits against police officers).

The nature of the relationship and the transference phenomenon blinded the patients in *Simmons* and *Greenberg* from comprehending the true nature of their injuries and its source. These cases are very similar to the coma cases in that the negligence itself (sleeping with a patient) was insulated from the patient's detection by the wrong-doer. Because of the special relationship, which the therapist abused, the patients did not question the wrongful activity or recognize it as the source of their injuries.

The government attempts to distinguish the transference cases. It claims that "Barren was never in a therapist-patient relationship with the VA's psychiatrist, and, therefore, the conditions for unquestioning trust were not present." Brief of Appellant, at 21 n.11. The government's attempted distinction misses the point. It essentially argues that Barren's case is distinguishable because he complains of too little psychiatric assistance, not too much. The analogy to the transference abuse cases does not derive from the fact that both cases involve therapists, but rather that both cases involve wrong-

doers who are insulated from suit because the patient cannot reasonably be expected to understand the nature or the source of his or her injuries. In the case of transference abuse, the therapist shields himself from the patient's discovery of the wrong by taking advantage of the special dependent relationship to cover up the injury he is inflicting. The therapist assures the patient that the sexual encounter is an important part of the therapy thus insulating his harmful conduct from detection as the source of the patient's worsened mental health. In Barren's case, the progression of Barren's mental illness under Dr. Anghel's care prevented Barren from discovering his injury.

3. Barren's Case

I have discussed the above precedents in detail to demonstrate that my objection to the holding in this case stems from more than personal distaste for the obvious unfairness of the result, a sentiment shared by the majority. I find no principled way to distinguish Barren's case from the cases discussed above. In both lines of cases the plaintiff is unable to detect the injury and its source through no omission of his own, but rather because of the malfeasance of the wrongdoer himself. Admittedly, a coma seems more dramatic, and perhaps is easier to understand. I must stress, however, that Barren's case is analytically no different. Clear, unchallenged evidence indicates that, because of the government's negligence, Barren was unable to perceive the worsening of of his mental condition. For the purposes of recognizing his injury, he was akin to a comatose patient (*Clifford, Washingotn*), or a patient whose therapist has violated transference relationship (*Simmons, Greenberg*).

The government claims that the rule I espouse is "unworkable as a practical matter," because it "does not indicate how long accrual should be delayed." Appellant's Br. at 22. I have four responses to the concern that this narrow rule might engender a case with no foreseeable statutory time limit.[4] First,

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[4] Additionally, I note that the very nature of the *Kubrick* discovery rule indicates that in some cases the government will have to wait a long time after its original tort before it is sued. Furthermore, other factors, such as continuous treatment, often result in the *de facto* tolling of the limitations period. *See, e.g.*, Otto v. Nationai Institute of Health, 815 F.2d 985 (4th Cir. 1987).

this is obviously a narrow rule. In adding Barren's case to the short list of situations, like comas and transference abuse. Where the patient cannot reasonably be expected to discover the injury and its cause because of the very negligence, we do not open the courthouse doors to a floodgate of stale claims. *See Dundon,* 559 F. Supp. 469, 475 ("[t]he exception is narrow and merely prevents 'blameless ignorance' from being penalized, by avoiding the anomalous result of having an arguably wronged comatose patient denied his right to press a claim by virtue of the very malpractice of which he seeks to complain").

Second, as other courts that have considered this same question have observed, the passage of time handicaps the interests of both sides, and a plaintiff who brings suit after too long a period will have trouble adducing evidence and proving his claim. For example, the Ninth Circuit noted in *Washington* that "[t]he [plaintiffs], as well as the government, share this increased burden caused by the passage of time, and the [plaintiffs] should not be prevented from maintaining this action when the government was responsible for the condition which caused the delay." 769 F.2d at 1439 (citations omitted). Similarly, Judge Arnold noted that

> [t]he government's best argument is that the rule advocated by plaintiff might leave it open to suit indefinitely. No doubt that is true, at least in theory.... Probably the real exposure of the government to liability would be slight in such cases, though. The passage of time should make it progressively more difficult for plaintiff to prove his case.

Clifford, 738 F.2d at 980.

Third, anyone conducting that balance in this case would at once note that the government would not have to wait for the claim to accrue for years on end. At the very latest, the statute of limitations would have begun to run when John Barren was deemed mentally incompetent and his sister was appointed as guardian. *See Clifford,* 738 F.2d at 980 (statute of limitations did not begin to run until guardian was appointed); *Zeidler v. United States,* 601 F.2d 527 (10th Cir. 1979)(statute of limitations did not begin to run until conservator appointed). I

believe that the doctrine of laches can be relied upon to balance the rights of the plaintiff against the need of the government to know when it will be sued. Laches has historically been an effective barrier to such claims not subject, for one reason or another, to a statutory time bar. Here the doctrine of laches would not appear to bar the plaintiff's claim.

Finally, and most important, even if we find that the government would be exposed to additional liabilities, I believe we must balance the harm to the government against the intolerable effect of the majority's holding, which allows the government to benefit from its own negligence. *See Clifford*, 738 F.2d at 980 ("we are persuaded that the rule contended for by the government would be still more objectionable. For under it the government would profit from its own (alleged) wrong").

At bottom, I believe that the *Kubrick* rule simply cannot apply to this case. As I have stressed above, I advocate an exception to that rule not because of Barren's mental incompetency *simpliciter*, but because of the government's conceded participation in Barren's inability to perceive his injury. Judge Cowen and Sloviter emphasize that the test cannot be subjective. For this proposition they recite blackletter law, but they cite no cases that deal with the unusual circumstances of this case. Nor do they directly confront the coma or transference lines of cases. In sum, I find the *Kubrick* rule tragically inappropriate under the circumstances. Instead, I advocate following the wise jurisprudence of courts that have carved a narrow equitable exception to the reasonable person standard of *Kubrick* where the government itself has fostered the plaintiff's incapacity to comprehend the nature and source of his injury.[5]

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[5] Judge Sloviter suggests that the position I advocate would "change the statute." Concurring Op. typescript at 6. I disagree. The statute requires that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). The determination of when a medical malpractice claim accrues, however, is an inherently judicial inquiry. As discussed above, other courts of appeals have not found themselves to be powerless in circumstances analogous to Barren's case, and for the reasons I have set forth I think we should follow their lead.

II.

Finally, in view of my conclusion above, I address the question that the majority and concurrence do not reach concerning the Pennsylvania immunity statutes. *See* maj. op. typescript at 14 n.8. I find these to be vexing questions and I hesitate to pronounce on them here in the depth that would be otherwise justified given my dissenting posture. Nevertheless, at least to indicate that my vigorous opposition to the holding of this case is not a vain exercise, I will explain briefly why I do not believe that the government is entitled to full immunity under the Pennsylvania statutes.

The government argues that it is entitled to all immunity available to any individual or government body. For this proposition it cites *General Electric Co. v. United States,* 813 F.2d 1273 (4th Cir. 1987), *vacated on other grounds,* 56 U.S.L.W. 3477 (Jan 19, 1988), holding the United States immune from tort suit because a Maryland employer would be immune from tort suit under Maryland's workers' compensation law. Proceeding from this premise, the government raises two alternative immunity claims derived from Pennsylvania state law.[6] First, it claims immunity pursuant to 50 Pa. Stat. § 4603, which was effective when Dr. Anghel negligently treated Barren but was repealed in 1976. The statute provides that

> No person and no governmental or recognized nonprofit health or welfare organization or agency shall be held civilly or criminally liable for any diagnosis, opinion, report or any thing done pursuant to the provisions of this act if he acted in good faith and not falsely, corruptly, maliciously or without reasonable cause; provided, however, that causes of

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[6] I discuss only the first statute because I believe the second one, 50 Pa. Stat. § 7114, does not apply. Section 7114 was passed after the negligence in this case had already occurred. *See* 1 Pa. C.S.A. § 1926 (Purdon's Pa. St. Ann. 1987 Supp.) (effective 1972) ("No statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly"). *See* Hanczar v. Trellis, 14 Pa. D. & C. 3d 466, 468 (Arbitration Panel for Health Care) *permission to appeal denied,* 14 Pa. D. & C. 3d 470 (Pa. Commonwealth 1980).

> action based upon gross negligence or incompetence shall not be affected by the immunities granted by this section.

§ 603 Mental Health and Mental Retardation Act of 1966, 50 Pa. Stat. § 4603 (1969) repealed by 53 Pa. Stat. § 5311.802.

I note that two courts in Pennsylvania have held that this provision applies only to protect *admission* decisions. *See Saunders v. Latrobe Area Hospital, Inc.*, 14 Pa. D. & C. 3d 458, 461-62 (Arbitration Panel for Health Care), *permission to appeal denied*, 14 Pa. D. & C. 3d 466 (Pa. Comnwlth. 1980); *Hanczar v. Trellts*, 14 Pa. D. & C. 3d 466, 468-69 (Arbitration Panel for Health Care), *permission to appeal denied*, 14 Pa. D. & C. 3d 470 (Pa. Comnwlth. 1980). It seems likely to me that the Supreme Court of Pennsylvania would similarly decide that the statute applies only to admission decisions. The statute would not, therefore, insulate the negligent treatment of Dr. Anghel (*e.g.*, improper drug dispensation, detrimental advice) though it would protect the failure to admit Barren for in-hospital psychological evaluation.

For the reasons set forth in Part I, I would affirm the district court's holding on the statute of limitations question. For the reasons briefly set forth in this section. I would remand the district court to decide two matters. First, I believe that the district court should consider the question whether Dr. Anghel's treatment rose to the level of gross negligence or incompetence, as alleged in Barren's complaint. It is clear from the language of the statute that if Dr. Anghel committed gross negligence, or was deemed incompetent, the statute would not bar recovery at all. *See Freach v. Commonwealth*, 471 Pa. 558, 370 A.2d 1163 (1977). Second, under my view, even if the statute applies, the district court must recalculate the damage award. I believe that under Pennsylvania law Barren is entitled to receive at least some of his award—that attributable to the negligent care he received—even if the district court ultimately must reduce the damages to immunize the government from its negligence in failing to admit Barren for observation and diagnosis.

I respectfully dissent.

A True Copy:

Teste:
Clerk of the United States Court of Appeals
for the Third Circuit

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5314

JOHN BARREN, an incompetent, by his guardian, HENRIETTA BARREN,

v.

UNITED STATES OF AMERICA,
Appellant.

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petiton for rehearing is denied.

Judge Becker would have granted rehearing for the reasons set forth in his dissenting opinion.

By the Court,

Circuit Judge

Dated: March 28, 1988

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 87-5314

JOHN BARREN, an incompetent, by his guardian HENRIETTA BARREN

vs.

UNITED STATES OF AMERICA,
Appellant.

(D. C. Civil No. 81-1064)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: **SLOVITER, BECKER and COWEN*, *Circuit Judges***

* At the time this case was argued, Judge Cowen was a U.S. District Judge for the District of New Jersey sitting by desingation. On November 16, 1987 he entered on duty as a U.S. Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel November 2, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 13, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court with direction to enter judgment in favor of the United States. Each party to bear its own costs.

ATTEST:

Clerk

February 23, 1988

No. 87-5314

Certified as a true copy and issued in lieu of a formal mandate on April 5, 1988.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2103

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN BARREN, AN INCOMPETENT, BY HIS GUARDIAN, HENRIETTA BARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Upop.

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In the Supreme Court of the United States

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No. 87-2103

JOHN BARREN, AN INCOMPETENT, BY HIS GUARDIAN, HENRIETTA BARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the court of appeals' application of the accrual standard in *United States* v. *Kubrick*, 444 U.S. 111 (1979), to petitioner's medical malpractice claim brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

1. From January 1972 to February 1974, petitioner received out-patient treatment at the Veterans Administration (VA) hospital in Wilkes-Barre, Pennsylvania, for a skin condition and anxiety (Pet. App. 3c-4c). During that period, the VA doctor diagnosed his anxiety condition as "adjustment reaction of adolescence," and treated him with tranquilizers (*ibid.*). In August 1973, the VA determined that petitioner's mental condition was not service-related and denied his disability claim (*id.* at 4c). After petitioner was denied in-patient psychiatric care at the VA hospital in February 1974, he was voluntarily admitted, at

his sister's expense, for psychiatric hospitalization in non-VA hospitals under a private doctor's care (*ibid.*).

In October 1977, following a substantial deterioration of petitioner's condition, the VA reversed its prior decision, determined that petitioner's mental condition was service related, and awarded him a disability retroactive to February 26, 1973.[1] In September 1979, petitioner and his sister filed medical malpractice claims with the VA. Petitioner sought principally non-economic damages for the aggravation of his pre-existing mental condition. Barren's sister sought reimbursement of medical expenses, including the costs of private hospitalization, incurred on behalf of petitioner. After trial, the district court held that petitioner's sister's claim was barred under *Kubrick* because "[p]laintiffs have offered no evidence, nor can the court educe any evidence from the record, to show why she did not discover or, through the exercise of reasonable diligence, should have discovered, the injury claimed and its cause [prior to 1977]" (Pet. App. 9a).

With respect to petitioner's claim, however, the district court applied a different discovery rule. The district court found that because petitioner's mental condition "affected his ability to understand that * * * the second injury [of aggravation of his mental condition] occurred" (Pet. App. 8a), he could not "through the exercise of reasonable diligence" have discovered his injury before October 1977 (*id.* at 9a). Taking into account the subjective factor of petitioner's mental state in applying the *Kubrick* standard, the court determined that the action was not time-barred, since the statute of limitations could not have commenced to run earlier than two years before the filing on September 7, 1979 of petitioner's administrative action (*ibid.*).

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[1] The 30% disability awarded on October 30, 1977 was increased to 50% on March 15, 1979, and to 100% on October 18, 1984 (Pet. App. 4c-5c).

After trial, the district court found that the VA "made no meaningful effort to diagnose Barren's condition or to treat it in the proper manner" (Pet. App. 25a), and that the VA doctor failed to provide necessary in-patient hospitalization and standard out-patient care (*id.* at 24a). It entered judgment for petitioner for $1,124,000 (*id.* at 7b). The government appealed.

2. In a divided panel decision, the court of appeals reversed the decision of the district court on the ground that "the [district] court incorrectly applied the legal standard [in *Kubrick*] in assessing the timeliness of plaintiff's claims under section 2401(b), and in effect improperly tolled the statute of limitations" (Pet. App. 11c). Judge Cowen, in his separate opinion,[2] stated that "*Kubrick* makes clear [that the accrual] rule cannot be subjectively applied" (*id.* at 10c). Rather, *Kubrick* mandates application of an *objective* accrual test, to wit: whether the petitioner "possessed the facts such that, as a reasonable person, he should have known of the malpractice" (*id.* at 8c). Judge Cowen explained that (*id.* at 10c (citations omitted)):

> [a]llowing Barren to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations. Such extensions have uniformly been rejected by this and other courts of appeals.

Judge Cowen added that petitioner's situation did not involve fraud, continuing treatment by a physician, or the development of a transference relationship by a patient with her doctor, "which might mask the malpractice and excuse the failure to timely file a claim" (*id.* at 8c n.6). Applying the standard of an "objectively reasonable per-

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[2] Judges Cowen and Sloviter concurred in the judgment, but both wrote separate opinions. Judge Cowen's opinion apparently speaks only for himself.

son," Judge Cowen thus concluded that petitioner's claim accrued well before the October 1977 date identified by the district court (*id.* at 8c-11c).[3]

In a concurring opinion, Judge Sloviter agreed that "[i]nclusion of a plaintiff's mental incapacity as a factor to be considered in determining the reasonableness of plaintiff's diligence runs counter" to the established objective approach (Pet. App. 14c). She concluded (*ibid.*):

> Indeed in this case, the *only* factor that distinguished plaintiff's situation from that of his sister was his mental incapacity. Since that interposes an impermissible subjective element into the reasonable person standard, *see* Restatement (Second) of Torts, §§ 283B, 283C (1964), the district court's reliance on the plaintiff's mental incapacity was legal error.

Judge Becker dissented, stating that he had "no disagreement with Judge Cowen or Judge Sloviter concerning the general rule governing the statute of limitations for malpractice" (Pet. App. 16c). Judge Becker argued that the government's responsibility for Barren's inability to perceive his own mental deterioration justified the application of a "narrow, yet recognized equitable exception to the *Kubrick* general rule" (*id.* at 16c-17c).[4]

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[3] Judge Cowen pointed in particular to petitioner's decision prior to 1977 to seek treatment outside the VA system and to the district court's finding that petitioner's sister's claim, filed at the same time as petitioner's, was untimely under the *Kubrick* test (Pet. App. 9c).

[4] In addition to the statute of limitations, the government also invoked certain immunity provisions under Pennsylvania mental health statutes as grounds supporting dismissal of this suit. In particular, we argued below that under either the Pennsylvania Mental Health and Mental Retardation Act of 1966 (in effect at the time the VA denied voluntary admission to petitioner), Pa. Stat. Ann. tit. 50, § 4603 (Purdon 1969), or the Mental Health Procedures Act of 1976 (currently in effect), Pa. Stat. Ann. tit. 50, § 7114 (Purdon Supp. 1988), the government is immune from liability for its psychiatrist's negligence

3. The court of appeals' application of the *Kubrick* standard to the facts of this case was correct. It is well established that a plaintiff's mental disability does not justify an exception to the objective "reasonable person" test governing the accrual of claims under the FTCA, and there is no serious question that an "objectively reasonable person" would have filed his malpractice claim, based on events in 1972 and 1973, long before petitioner's 1979 filing.[5] Moreover, petitioner's argument that the Court should recognize an exception to this objective standard for mental disabilities aggravated by government malpractice represents an extremely narrow class of cases not meriting this Court's attention.[6]

It is well settled that "[i]nsanity, such as constitutes a legal disability in most states, does not toll the statute of limitations under the Federal Tort Claims Act." *Casias* v. *United States*, 532 F. 2d 1339, 1342 (10th Cir. 1976) (citing *Accardi* v. *United States*, 435 F. 2d 1239 (3d Cir. 1970), and *Williams* v. *United States*, 228 F. 2d 129 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956)). Both Judge

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(Pet. App. 27c-28c). Although the district court denied immunity on this ground, and the majority of the court of appeals panel did not reach the question, Judge Becker's dissent concluded that the earlier enactment may well bar recovery as to the portion of the claim involving failure to admit petitioner for hospitalization (Gov't C.A. Br. 24-28). As Judge Becker pointed out, it is unclear whether any of the damages awarded were attributable to the VA's out-patient care (Pet. App. 28c).

[5] The deterioration of petitioner's mental condition as well as the cause of his decline were manifestly apparent long before October 1977. As Judge Cowen's opinion noted, "the very fact that [petitioner] sought treatment outside the VA [in 1974] is a clear indication that he believed the treatment provided by the VA was unsatisfactory" (Pet. App. 9c).

[6] We are unaware of any other case involving alleged aggravation of a claimant's pre-existing insanity.

Cowen and Judge Sloviter relied on this undisputed principle, which squarely controls the disposition of this case.

Petitioner argues that the government's role in allowing petitioner's mental condition to worsen justifies consideration of plaintiff's condition as one of many factors bearing on the reasonableness of plaintiff's diligence in discovering the fact and cause of his injury.[7] However, the cases cited by petitioner in support of this argument extend the statute of limitations for claimants rendered comatose, lobotomized, or traumatized by a sexual relationship with a therapist (Pet. 5-7), and thus are not in conflict with the rule that mental incompetence does not itself affect the running of the statute of limitations. Judge Sloviter's concurring opinion below recognized, correctly in our view, that the "extraordinary situations" presented in those cases were distinguishable "from a case such as this alleging some lesser level of mental incapacity" (Pet. App. 15c n.2). The very same cases acknowledge this distinction and expressly affirm the continuing vitality of the principle that mental incompetence is not a factor in the determination of the timeliness of an FTCA claim. See *Zeidler* v. *United States*, 601 F. 2d 527, 531 (10th Cir. 1979) ("the insanity rule discussed in *Casias*" does not apply in the case of a lobotomized plaintiff because "brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity for the purpose of barring * * * an action [under the FTCA]"); *Clifford by Clifford* v. *United States*, 738 F. 2d 977, 980 (8th Cir. 1984) (the court's holding that a cause of action under the FTCA

[7] Petitioner failed to argue in the court of appeals that application of the doctrine of equitable tolling justified the district court's holding (see Pltf.-Appellee's Br. 14). Because the distinct question of equitable tolling was not before the court of appeals, this case is not an appropriate vehicle for this Court's review based on the theory of equity outlined by Judge Becker in dissent.

does not accrue while plaintiff is in coma leaves undisturbed the incompetency rule articulated in *Casias*).[8]

We recognize that it is possible to construe the cases cited by petitioner as at odds with the general principle that the individual's capacity to appreciate his injury has no place in assessing a claim's timeliness under *Kubrick*. However, this potential inconsistency does not warrant this court's review of the instant case. The distinctive facts of those cases make clear that they pose no direct conflict with the decision below. In addition, the absence of any significant number of cases raising the issue presented here indicates no pressing need to resolve the tension in reasoning between the present case and those cited by petitioner.

Petitioner's subjective test, if applied here, would represent a significant departure from the "reasonable person" approach employed in *Kubrick*. Application of petitioner's standard would substantially prolong the limitations period in a number of cases. In addition, petitioner's approach would require a case-by-case determination of the claimant's capacity to appreciate the manifestations of his injury throughout the period prior to filing.

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[8] See also *Dundon* v. *United States*, 559 F. Supp. 469, 474 (E.D.N.Y. 1983), in which the district court reiterated the *Casias* insanity rule and distinguished coma from mental disability for the purpose of determining when the statute of limitations begins to run; and *Washington* v. *United States*, 769 F.2d 1436, 1438-1439 & n.1 (9th Cir. 1985), in which the court relies on *Clifford* to distinguish coma from mental incompetence for the purpose of applying *Casias*.

Petitioner also cites an FTCA malpractice case in which plaintiff's understanding of her injury was hindered by the psychological effects of her sexual relationship with her physician. See *Simmons* v. *United States*, 805 F.2d 1363 (9th Cir. 1986). The holding of this case is narrowly confined to the situation involving abuse of the transference phenomenon.

The adoption of an accrual standard that allows a plaintiff's mental disorder to be taken into account would invite consideration of a host of factors bearing on the plaintiff's subjective ability to appreciate the facts and cause of his injury. Such an approach would undermine the important goals of administrative regularity and prompt presentation of claims.

This Court recognized in *Kubrick*, 444 U.S. at 125, that statutes of limitations often effect a harsh result by cutting off valid claims. This, however, does not justify a refusal to apply statutes of limitations in an objective and predictable way. Petitioner's invitation to substitute an ad hoc, case-by-case approach should be rejected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

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